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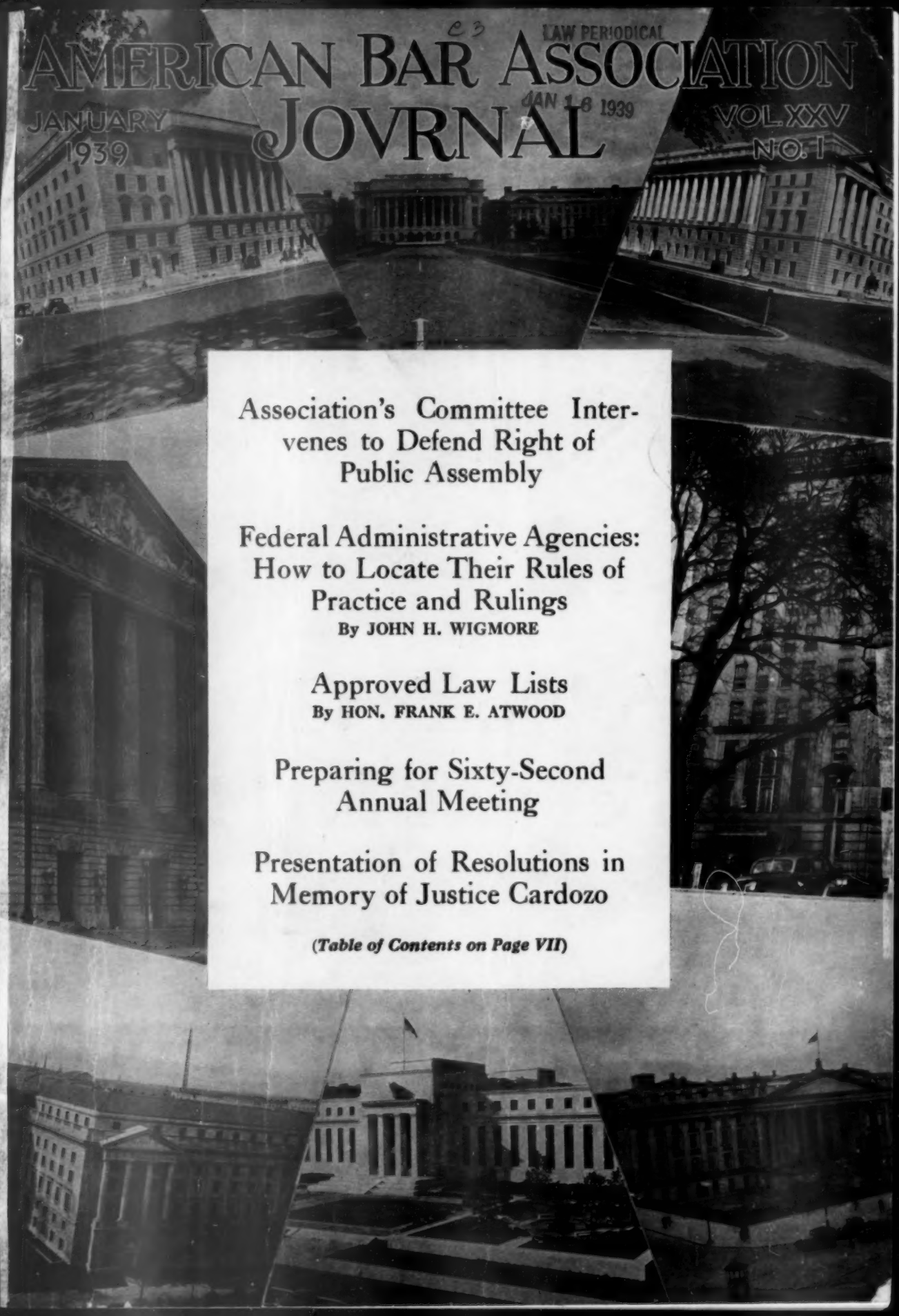

Association's Committee Intervenes to Defend Right of Public Assembly

Federal Administrative Agencies: How to Locate Their Rules of Practice and Rulings

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The Season's Greetings and Best Wishes to All!

THE ÆTNA CASUALTY AND SURETY COMPANY
And Affiliated Companies of Hartford, Connecticut

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AMERICAN BAR ASSOCIATION
JANUARY 1939 JOVRNAL VOL. XXV No. 1

CURRENT EVENTS

Committee on Bill of Rights Urges That Similar Committees Be Appointed in the State and Larger Local Bar Associations—Local Cooperation Need to Achieve Committee's Objectives

THE following letter has been sent by the Chairman of the Association's Committee on the Bill of Rights to the Presidents of State Bar Associations and the larger local Bar Associations:

"Pursuant to a vote of the recently appointed Committee on the Bill of Rights of the American Bar Association, I am writing as Chairman to express the hope that the State Bar Association of ——— may see fit to authorize the appointment of a similar Committee. . . .

"One of our Committee's specific purposes is to try to see to it that no person who has a substantial claim that his basic civil rights have been infringed, shall lack proper representation if he is unable to obtain competent counsel. Another purpose is to bring to bear the united influence of the Bar to prevent or oppose abuses of governmental power or other acts violative of the rights secured by the Constitution of the United States or the Constitutions of the several states.

"In the few months during which our Committee has existed, it has become clearly apparent that the puposes in view cannot be realized through the agency of a central committee alone and that to achieve them, it will be necessary to have representative and able committees of the Bar functioning actively throughout the country. Committees to deal with this subject have already been authorized or appointed by the State Bar Associations of Connecticut, Indiana, Ohio, Vermont and the District of Columbia; also by the Los Angeles Bar Association, the Chicago Bar Association and the New York County Lawyers Association. The National Lawyers Guild and the Federal Bar Association (organized in and near New York City) also have committees of this character.

"Having in mind the desirability that committees of this sort should be organized by all the State Bar Associations and the Associations in the larger centers, I have been instructed by our Committee to write this letter to the Presidents of all the State Associations and to the Presidents of the Bar Associations in the 37 cities of the nation having a population of over 200,000—with the exception of the eight associations above mentioned that have already acted in the matter.

"The precise name of such state and local committees does not seem to us vital. Sometimes it might be "Committee on Civil Rights" (as in the case of the recently appointed Committees of the New York County Lawyers Association, and of the Chicago Bar Association); or it might be the "Committee on Civil Liberties" (as in the case of the Ohio State Bar Association) or the "Constitutional Rights Committee" as in the case of the Los Angeles Bar Association, or the "Committee on the Bill of Rights." Since, however, a measure of uniformity may be desirable, we suggest that consideration be given to the "Constitutional Rights Committee" as an appropriate name.

"The scope and activities of such state and city Bar Association committees must, of course, be a matter for determination by the respective associations. But, having given much consideration to the subject, we venture to submit the following suggestions as to appropriate purposes of such committees:

"(a) To take cognizance of any meritorious claim of a violation in the State or city of the State Constitution and of the Federal Constitution, in respect of basic rights, such as freedom of the press, speech, assembly and petition, or unreasonable searches and seizures or other fundamental rights; and if the complainant cannot otherwise obtain competent advice, to see to it that proper representation is secured;

"(b) To protest in the name of the Bar against important and clear violations of constitutional rights in the State or city, whether by legislative or administrative action or otherwise;

"(c) To be in a position to join with other State and local associations and with the American Bar Association in any united action that may seem advisable in case of a threat to our constitutional liberties of such an important character as to require national action on the part of the Bar;

"(d) To conduct occasional discussions and to disseminate information among members of the Bar and the community generally concerning our constitutional liberties—their historical background, recent decisions of the Supreme Court, etc.—to the end that violations thereof may be the better recognized and steps taken to prevent or correct them.

"The Junior Bar Conference (a section of the American Bar Association comprising some 6,000 lawyers under 36) has taken a great interest in this subject. At the meeting of the Conference in Cleveland in July, 1938, a Committee of the Conference submitted an excellent report on the extent of violations of constitutional rights throughout the United States, and a Committee of seven members of the Conference under the Chairmanship of Lewis F. Powell, Jr., of Richmond, Va., has been appointed to deal with the subject. In order to coordinate the work of the Junior Bar Conference in this field and to avoid duplication of effort, we respectfully suggest that, if your Association sees fit to appoint such a Committee, considerable representation thereon be given to those of Junior Bar age—say two out of a committee of five, or three out of a committee of seven.

"The policies and activities of state and local Bar Associations of this character will obviously be matters for determination by the respective associations and the committees themselves. On the other hand, it will be clearly desirable, in our Committee's judgment,

that there should be some contact between our central Committee of the American Bar Association and the respective state and local committees. We will, therefore, hope to keep in touch with the various committees that may be appointed, through correspondence and occasional bulletins, and will request them to inform us from time to time of their organization, policies and activities. We have in mind that in this way, without attempting complete uniformity of policy, there may be an advantageous exchange of views. We also have in mind making a report to the annual convention of the American Bar Association in San Francisco in July, 1939, as to the progress made by the organized Bar in this field.

"It is thought that some of the State Bar Associations may wish to coordinate the activities of their local Bar Associations in this field. Our Committee has addressed only the thirty-seven hereinbefore mentioned.

"It is the thought of our Committee that if it can be brought about that strong committees of the Bar on constitutional rights are organized in every State of the Union and in the larger centers, this would be a strong assurance and safeguard for the maintenance of basic American liberties in these troubled times.

"An early reply respecting such action as you may take will be much appreciated.

Very truly yours,
GRENVILLE CLARK, Chairman,
31 Nassau St., New York City."

Resolution on Nazi Persecution

AT a meeting of the Association of the Bar of the City of New York, held on Dec. 13, the following resolutions, prepared by Charles C. Burlingham, John W. Davis and Thomas D. Thacher, former Presidents of the Association, were presented by Hon Samuel Seabury and adopted:

"As American citizens enjoying liberty under law, and as lawyers, familiar with the history of the long struggle to secure and preserve the rights of free men, knowing that Magna Carta and the Bill of Rights are not self-executing and that the price of liberty is eternal vigilance, we have watched, first with surprise and shock and later with dismay and abhorrence, the ever-increasing and cumulating violations by the Government of the German Reich of rights heretofore regarded as fundamental in Germany itself as in all civilized countries. This recrudescence of barbism in Germany, extended into Austria and now exhibiting itself in the parts of Czecho-Slovakia recently annexed, has been marked by arrests, incarcerations in prisons and concentration camps, seizures and confiscations not only without due process of law but without even the pretence or shadow of law, for no crime or legal wrong but solely on grounds of race, religion or political opinions. Such systematic wholesale persecution is without parallel in the history of civilized countries.

"We hereby express our sympathy with the innocent victims of German cruelties who have been and are at this moment suffering from persecution and proscription, and we ask the lawyers of our city, our state and the Nation, and especially the Bar Associations national, state and local, to join us in this expression of symapthy and this protest against the continuance of the inhuman treatment by the German Reich of innocent men, women and children.

"RESOLVED, that the foregoing statement of the views of this Association be sent by the Secretary to the President of the American Bar Association, requesting that that Association transmit this statement to the state bar associations of the several states in the United States and also that the Secretary send a copy of the statement to the President of the New York State Bar Association, requesting that that association transmit this statement to all the local bar associations in the state of New York—with the view that all these associations, national, state and local, shall take immediate action."

Missouri Institute Moves for Procedural Reform

THE Missouri Institute for the Administration of Justice has started a movement to have practice and procedure in Missouri governed by Rules of Court to be promulgated by the Supreme Court of Missouri. It contemplates that these rules would conform as nearly as local circumstances permit to the Rules of Practice in the District Courts of the United States now in effect in Federal District Courts.

"The Institute proposes to bring this about by appropriate legislation, or if need be on account of Constitutional provisions, by amendment to the Constitution of Missouri," says an official letter asking the support of all the lawyers in the State. "This proposal was submitted to the Missouri Bar Association at the convention in St. Louis, October 1, and met with unanimous approval of that Association.

"At the instance of the Missouri Institute, one of the major political Parties, in its platform included a plank on the subject, stating: 'We believe that the relations of modern society demand reform of legal procedure, both civil and criminal, by expediting the operation of our courts. This will best be accomplished by authorizing our Supreme Court to control the formulation and amendment of procedural rules.' . . .

"The Institute feels that every lawyer in Missouri is troubled by the present situation. We are required to learn the procedure and practice defined by the Rules of Civil Procedure in the District Courts, promulgated by the Supreme Court of the United States. Why should we also be required to maintain familiarity with a different code of procedure in our State Courts? Without reference to the many advantages of the Federal procedure, it would appear advantageous to all lawyers, as far as practicable, to adapt Missouri procedure to that in effect in the Federal Courts, to the end that as near as may be, one need be versed in but one general type of procedure in law courts. If, in addition to this, we consider the fact that our statutes, with their haphazard amendments from time to time, constitute a complex, inflexible and antiquated code of practice, the need for change in Missouri is more readily apparent.

"The New Federal Rules combine the experience, wisdom, and judgment of the finest thinkers on the subject. The method of changing is simple. With Legislative authority Rules of Court substantially similar to the Federal Rules, can be adopted without going through exhaustive experimentation. Every lawyer should foster this movement to govern practice and procedure in Missouri by Rules of Court, to be promulgated from time to time by the Supreme Court of Missouri."

Admission Standards Raised in Iowa and the District of Columbia

HEARINGS before two courts were responsible for increases in the standards of admission to the bar during the month of December in Iowa and in the District of Columbia, while a hearing before the Court of Appeals in Kentucky has put the matter before the court in that state.

In Iowa after the matter had been favorably passed on at the State Bar meeting, a series of specific recommendations were drawn up by the Committee on Legal Education and Admissions to the Bar and presented to the State Bar Executive Committee and approved by it on September 19. These recommendations were presented to the court by Attorney General John H. Mitchell on December 13 and were adopted in

toto. They provide for two full years of pre-legal college education in an approved college or university and specify that the required three years of law study, if pursued in a law office, shall be of such content as shall amount to the substantial equivalent of three years of law school study.

The fee for non-resident attorneys seeking admission without examination was raised from $10 to $40, and a provision adopted requiring that $25 of this fee shall be used in payment of the cost of the character investigation service of The National Conference of Bar Examiners. A change was made in the method of grading papers and a limitation of three bar examinations per candidate was adopted.

The hearing before the United States District Court for the District of Columbia on December 5 resulted in the adoption of a rule that after October 1, 1944, no student shall be admitted unless he has had two years of pre-legal college education or its equivalent and has studied law for at least three years in a law school approved by the Court. The equivalent of the college education may be shown either by passing an examination given by an approved college or university, showing that the applicant has had the equivalent of two years of education in such institution, or by a certificate from the Committee on Bar Admissions that before enrolling in a law school the applicant has had the equivalent of the specified two years of college education. A special examination may be required for this purpose. The Court further considered the matter of character investigation of all applicants and provided that in each case there shall be an exhaustive examination, to be made by an appropriate agency, as to the applicant's character. The Committee on Bar Admissions is given the responsibility of carrying out this provision.

With the promulgation of these rules, the number of jurisdictions now having a requirement of two years of college education or its equivalent has increased to thirty-nine. As stated above, the Kentucky court now has the matter under advisement. The other nine states which have not yet acted are Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, Oklahoma, South Carolina and South Dakota.

With the adoption of the character investigation service of the National Conference in Iowa, half of the forty-eight states are now protecting themselves in this way against migrant attorneys not possessing "good moral character."

State Bar Associations Become Institute-Conscious — Three Held at Recent Meeting of Michigan State Bar — Similar Activities by Other Associations—Wide Program of Institutes for Smaller Bars Being Pushed

AMONG the growing ranks of associations which are making legal institutes a part of their programs, the names of State Bar Associations are beginning to be found. Some State Associations have for a number of years featured at their annual meetings addresses on specialized subjects of interest to their membership, but these have been usually given as parts of the program of a particular section rather than as the main feature of the meeting. During the present year, however, State Bar Associations have definitely interested themselves in the city type of institute, usually consisting of several lectures on a subject of such general interest as to be attractive to all those attending the convention.

At the Michigan Sate Bar meeting in October, for example, there were three so-called institutes, one on the Chandler Bankruptcy Act, one on "The Probate Court," and one on "New Court Rules." In Missouri the following month, the afternoon before the regular sessions of the State Bar meeting opened in St. Louis was devoted to four hours of discussion of the new federal rules by Professor Edson R. Sunderland of the University of Michigan. This meeting was attended by about 750 lawyers. On November 19, the Nebraska State Bar Association, under the guidance of President Harvey Johnsen, put on an institute in Omaha on the Federal rules, unconnected with any stated meeting of the Association. Professor Wilbur H. Cherry of the University of Minnesota and Mr. James G. Gamble of Des Moines, members of the Supreme Court Advisory Committee, addressed an audience of about 500 at that meeting. Mr. David A. Fitch was chairman of the institute committee.

Early in December a two-day institute on the federal rules was held by the Florida Bar Association in Gainesville. It was arranged with the University of Florida that the institute should be held under the direction of the General Extension Division of the University but the Bar Association committee was responsible for the program. An admission charge of $3 for practicing lawyers and $1 for students was made. Sessions began Friday morning and continued through the day. There was a banquet Friday night, and the sessions were resumed on Saturday and continued until noon.

Mr. Raymer F. Maguire, chairman of the Florida State Bar Association Committee on Legal Institutes and Clinics, reported that there was an attendance of over 400. Speakers included Professor Clarence J. TeSelle of the University of Florida Law School, Judge Joseph C. Hutcheson of the Circuit Court of Appeals of the Fifth Circuit, Professor James W. Moore, author of a recent treatise on the rules and assistant to the Reporter for the Advisory Committee, and Professor Clifford W. Crandall of the University of Florida. A round table was arranged for after each lecture. "One thing it would seem that this institute demonstrated beyond the point of cavil," writes Mr. Maguire, "and that is that the leading lawyers of this state are much interested in post admission education when programs are effectively arranged."

When the Pennsylvania Bar Association meets at Hershey for its mid-winter meeting, one of the features will be an institute on the Federal rules, which is scheduled for January 6 and 7.

In the meanwhile, work is actively going on to interest State Bar Associations in organizing a wide program of local institutes for the benefit of the small local associations and the lawyers in the smaller communities. The Iowa Bar Association led the way in this movement last year and its then President, Mr. Burt J. Thompson of Forest City, has been made the Chairman of the Committee of the American Bar Association Legal Education Section which has the duty of promoting legal institutes, both large and small. Mr. Thompson has been in communication with many bar associations on this subject and reports that there are a considerable number of State Associations which are making this a major endeavor. His article on this subject appears elsewhere in this issue. Iowa is continuing to emphasize the small legal institute, and its committee, under the chairmanship of Mr. Paul B. DeWitt, has set as a goal the holding of four institutes during the year in each of the twenty-one districts of the state. A comprehensive list of speakers and subjects has been prepared, and a substantial sum of money has already been raised for the purpose of financing these institutes on a state-wide basis.

Local Associations Holding Institutes on Federal Rules and Other Important Subjects—Programs Which May Give Helpful Suggestions to Associations Planning These Meetings

LOCAL associations have continued to bring out large audiences for legal institutes, both on the Federal rules and on other subjects. An all-day conference in Cincinnati on December 10 discussed the new Federal rules as relating to judicial procedure in Ohio. This was the fifth annual conference. The method of arranging the program is so unique and has been productive of such excellent results that the program as set up by Professor Edson R. Sunderland of the University of Michigan is here given in detail. Chief Justice Carl V. Weygandt of the Ohio Supreme Court presided over the morning sessions and President Edward P. Moulinier of the Cincinnati Bar Association presided in the afternoon. The conference was opened by a general statement by Professor Silas R. Harris of Ohio State University on the "Regulation of Procedure by Rules of Court" and a statement by Professor Sunderland on the "Extent of Judicial Discretion Conferred by the New Federal Rules." Thereafter the discussion of each topic was opened by these two speakers who indicated the gist of the Federal rule involved and compared it with the present Ohio rule. The subjects and speakers were as follows:

Service of Process, Notices and Other Papers—Mr. Charles P. Taft.

Methods of Stating Claims and Defenses—Professor C. Fred Luberger.

Pre-Trial Procedure, and Summary and Declaratory Judgments—Hon. John H. Druffel.

Joinder of Claims, Defenses and Parties; And Use of Counterclaims—Hon. Simon Ross.

Amendments and Corrections of Process, Pleadings, Findings, Judgments and Orders, and Appellate Records—Hon. Nelson Schwab.

Interpleader, Intervention, Class Actions and Third Party Practice—Mr. Murray Seasongood.

Depositions and Discovery—Prof. Wm. W. Dawson.

Dismissals and Defaults—Mr. Bert Long.

Motion for Directed Verdict and for Judgment Notwithstanding the Verdict—Mrs. Alfred B. Bettman.

The Use of Juries: Demand, Selection, Special Verdicts, Instructions, References—Mr. Robert Guinther.

Consolidation and Severance, and Judgments at Various Stages—Mr. Henry G. Binns.

Manner of Taking Appeals—Hon. A. C. Denison.

Closing Summary by Prof. Sunderland.

At the end of the session those present were asked to fill out questionnaires which called for their opinion of the applicability of certain phases of the federal rules to Ohio practice. The Chairman of the Committee of Arrangements was Dean Merton L. Ferson of the University of Cincinnati Law School.

The Dayton Bar Association had a most successful, one-day session on the Federal rules, on Dec. 3, with Professor William W. Dawson of the Western Reserve University Law School as the speaker. He addressed 150 members of the local bar and surrounding counties on this subject.

A Toledo institute was held the middle of December, at the same time that the regional meeting of the State Bar was scheduled in that city. Professor Sunderland of the University of Michigan was the speaker. During the same week-end the New Orleans Bar Association was addressed on the subject of the rules by Dean Charles E. Clark of the Yale Law School, Mr. Edgar B. Tolman, Secretary and member of the Advisory Committee, Judge Joseph C. Hutcheson, Jr., of the Fifth Circuit Court of Appeals, and Mr. Monte M. Lemann of New Orleans, also a member of the Advisory Committee. Those lectures were held on Friday morning, Friday afternoon, Friday evening and Saturday morning in cooperation with the law schools of Louisiana State University, Loyola University and Tulane University. Mr. Charles F. Fletchinger was chairman of the committee on arrangements. The President of the New Orleans Bar Association is Mr. Benjamin Y. Wolf.

In a number of places the institutes are due to a large extent to the initiative of the local law schools. In San Francisco an institute on the Federal rules is being planned by the Alumni of the University of San Francisco Law School for early in January. The committee is at work under the chairmanship of Judge Hugh L. Smith and other members of the bar, as well as graduates of this University, will have the opportunity of attending. In Mississippi Dean T. C. Kimbrough of the University of Mississippi Law School has set January 13 for the holding of an institute on the rules of procedure for the United States District Courts. Speakers will include Mr. Walter P. Armstrong of Memphis and Mr. Monte Lemann of New Orleans.

Institutes on other subjects are also increasing in number. The Mahoning County Bar Association (Youngstown, O.) has invited Dean Henry M. Bates and several other members of the University of Michigan law faculty to conduct an institute of three lectures some time in the latter part of February. Dean Bates will also lecture on some phases of constitutional law before the Des Moines Bar Association in the early spring. Professor W. Barton Leach of Harvard is booked for Toledo in the spring. He spoke at the Hudson County (N. J.) Bar Association in December on the subject of the Drafting of Wills and Trusts. An institute was held in Nashville in December on the subject of the new Bankruptcy Act with Mr. Walter Chandler of Memphis and Referee Paul King of Detroit as speakers, and the New York County Lawyers' Association reports the following series of speakers and lecturers on this subject:

Uniform Practice before Referees and Procedural Innovations in the New Bankruptcy Act—Hon Irwin Kurtz, Referee in Bankruptcy.

Corporation Reorganizations — John Gerdes of New York, member of the National Bankruptcy Conference, and Hon. Edmund Burke, Jr., of the Securities and Exchange Commission.

Liens and Fraudulent Transfers—Prof. James A. McLaughlin of Harvard.

Arrangements—Jacob I. Weinstein, member of the National Bankruptcy Conference.

Title to Property and Priority and Provability of Claims and Debts—Hon. Peter B. Olney, Referee in Bankruptcy.

Preferences and Time Limitations for Suits by and Against Trustees—Hon. Robert P. Stephenson, Referee in Bankruptcy.

The U. S. Attorney and His Functions Under the Bankruptcy Act—Hon. Semour M. Klein, Assistant U. S. Attorney.

The program of practicing law lectures in different parts of the country continues to spread. The Law Alumni of Temple University have just announced a course which began in December and is given regularly on Saturday afternoons. A fee is charged members of the Temple Alumni Association and all others in order to cover the expenses of the committee. The subjects and lecturers are as follows:

How to Find the Law—Henry J. Brandt of The West Publishing Company.

New Federal Rules—Dean Charles E. Clark of the Yale Law School.

Income Tax—Fred L. Rosenbloom, formerly Field Agent and Conferee of the Bureau of Internal Revenue, and Joseph A. Wilson, Chief, Income Tax

Bureau, United States Internal Revenue Department, Philadelphia.

Wills—David G. Hunter of Temple University.

Workmen's Compensation — Alexander F. Barbieri.

Real Estate Settlements—Wesley H. Caldwell, William E. Schubert, James G. Schmidt and Philip C. Pendleton.

Bankruptcy—Bertram K. Wolfe of Temple University, Jerome Bennett and Edmund J. Bodziak.

Crimes—Lemuel B. Schofield of Temple University and Earl Jay Gratz, formerly Assistant District Attorney.

Divorce—Abraham L. Freedman of Temple University.

This is the third series of lectures of this type. The President of the Law Alumni Association of Temple University is Mr. Walter B. Gibbons, and Judge Charles Klein of the Orphans' Court is Chairman of the Committee on Post Graduate Courses. Several hundred lawyers are enrolled.

The Committee of the Legal Education Section on Program and Personnel for Legal Institutes, headed by Dean Albert J. Harno of the University of Illinois Law School, has recently completed a new list of suggested subjects and speakers for institutes of the larger city type. *Copies of this list are available on request to Association headquarters.*

Washington Letter

Bar's Resolutions on Justice Cardozo Presented to Supreme Court

THE resolutions in memory of Mr. Justice Cardozo, which the members of the bar of the Supreme Court adopted in November, were presented to the Court by Attorney General Homer Cummings at the Court's session of Monday, December 19, 1938. The Attorney General's address may be summarized by its final paragraph, where he said:

"Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold."

In response, Chief Justice Charles Evans Hughes well expressed the character of Justice Cardozo. Among the things he said were that "His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association, there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power."

The Chief Justice said also that "No judge ever came to this court more fully equipped by learning, acumen, dialectical skill and disinterested purpose. He came to us in the full maturity of his extraordinary intellectual power, and no one on this bench has every served with more untiring industry or more enlightened outlook."

Secretary Roper Retires

Mr. Daniel Calhoun Roper's resignation as Secretary of Commerce became effective December 23rd, having been announced about a week previously. In his letter to the President, it was indicated that several times since March 4, 1937, he had expressed his "desire to return to private life in order to give needed attention to my personal affairs and which I have not been able to do while in public office." In the President's reply he said, "I accept your resignation with very sincere regret."

Among Secretary Roper's many distinctions are that he was First Assistant Postmaster General from 1913 to 1916 and Commissioner of Internal Revenue from 1917 to 1920. He is a member of the American Bar Association. He is a native of South Carolina. It was his plan to go south at the completion of his official service.

State Taxing of Federal Salaries

The Supreme Court has accepted for consideration on its merits the case wherein the State of New York seeks to collect an income tax upon the 1934 salary of James B. O'Keefe, an attorney for the Federal Home Owners' Loan Corporation. The State insists that the tax is not "an unconstitutional burden on the Federal Government." The New York Court of Appeals decided that Mr. O'Keefe was performing a Federal function and that his salary could not be taxed by the State.

New Federal Communications Regulations

The recently issued regulations of the Federal Communications Commission, to become effective January 1, 1939, cover an interesting range of subjects for attorneys who will have occasion to appear before that agency. The subjects of the pamphlet's sixteen Parts are: 1. Administrative Provisions; 2. Personal Appearance, Practitioners; 3. Parties; 4. Applications and Amendments—General; 5. Amendments to Pleadings; 6. Petitions; 7. Subscription and verification; 8. Specifications as to Documents and Pleadings; 9. Service of Documents; Copies; 10. Proof of Official Record; 11. Subpoenas; 12. Hearings; 13. Motions Docket; 14. Rehearings; 15. Special provisions relating to Radio; and 16. Special provisions relating to Common Carriers.

One of the regulations, under the subject: "Personal Appearances; Practitioners", says: *"Former Employees.* No member, officer or employee of the Commission shall, within two years after his service with the Commission is terminated, appear as attorney before the Commission in any case or application which he has handled or passed upon while in the service of the Commission." This seems to be modeled after a general statute to the same effect, but covering ex-officers or ex-employees "in any of the departments". R. S. Sec. 190, Title 5, U. S. C. A. Sec. 99.

Sometimes an interesting case is likely to develop out of statutes and regulations such as these. It is apparent what the blunderbuss intent of such provisions is, viz., to prevent the unethical practice of a person representing the Government, either as an agent, attorney, or in a quasi-judicial capacity, at one time and then, later, representing the other party to the same controversy. Statutes legally designed toward accomplishing that purpose would, of course, be upheld, and rightly so. But, if ever it meets a strong test, it may become apparent that the statute referred to has attempted to "take in too much territory".

There can be no gravamen and therefore no offense where the former employee or officer had nothing whatever to do with the case while he was in the Government service; and hence there would seem to be no justification for preventing him from representing the parties later as their counsel. Nearly always it would be very easy to determine positively whether he had given attention to the matter while he was working for the Government. Another defect in this particular statute which probably would prove fatal to it is that it does not, nor does any other statute, provide a penalty for the offense which it attempts to create.

This subject of attempting to foreclose proper representation of clients by former officers is quite different from seeking to present a person "prosecuting any claim against the United States" while "being an officer of the United States" as is done by R. S. Sec. 5498, Title 18 U. S. C. A. Sec. 198; or to prevent an officer from receiving compensation for representing a person "in relation to any proceeding, contract,

claim, controversy," etc., "during his continuance in office", as provided in R. S. Sec. 1782, Title 18 U. S. C. A. Sec. 203.

Query: Where an anomalous situation of this sort exists, must it await the appearance of some one who is willing to be made the scapegoat or who steps into the quagmire inadvertently — meanwhile with there being much shying away from the issue on both sides, and perhaps an appreciable amount of subterfuge—or is there some due and proper way to iron out the difficulty? Of course, there may appear a public-spirited citizen who will attempt to have the issue settled by the declaratory judgment route.

Are Law Firms Under Fair Labor Standards Act?

There is no official answer to this question which has aroused considerable interest because of recent news stories following issuance of Interpretative Bulletin No. 6 by the Wage and Hour Division, United States Department of Labor, Office of the General Counsel. This bulletin makes no attempt to answer the question authoritatively; and raises it only incidentally. There is no other Government opinion or publication touching upon it directly.

Interpretative Bulletin No. 6 has very little to say about "legal firms." In fact it merely mentions them in a list of 32 types of business or services from which inquiries have been received, and then continues: "Each asserts that it is engaged in rendering 'service'. Although we recognize that the foregoing companies perform 'services', it is nevertheless our opinion that such enterprises are not, in the ordinary sense, sufficiently similar in character to retail establishments to be considered 'service establishments' within the meaning of Section 13(a)(2). This opinion is not free from doubt in respect of some of such classes of businesses and does not purport to embrace all possible sub-classifications."

Nominating Petitions

IOWA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate John Carlisle Pryor, Tama Building, Burlington, Iowa, for the office of State Delegate for and from the State of Iowa, to be elected in 1939:

J. L. Parrish, Jr., Maxwell A. O'Brien, Owen Cunningham, Robert T. Bates, Harry E. Beach, John J. Halloran, Corwin R. Bennett, Gordon L. Elliott, Loy Ladd, Thos. J. Guthrie, Ray Nyemaster, Jr., Edward J. Kelly, Frank J. Comfort, Thomas B. Roberts, Clyde B. Charlton, G. E. Brammer, L. A. Parker, W. F. Riley, Alfred A. Sulmonetti, Paul G. James, of Des Moines.

Mason Ladd, Paul Sayre, Percy Bordwell, Wiley Rutledge, O. K. Patton, C. M. Updegraff, Rollin M. Perkins, Philip Mechem, Wm. F. Morrison, J. M. Otto, A. C. Cahill, William R. Hart, Will J. Hayek, D. C. Nolan, Dan C. Dutcher, of Iowa City.

Henry C. Shull, C. F. Stilwill, D. P. Shull, David W. Stewart, Rex H. Hatfield, Jesse E. Marshall, Bernard T. Caine, J. M. Gunnell, Charles M. Stilwill, A. D. Clem, A. H. Bolton, T. P. Cleary, F. E. Gill, H. C. Harper, J. C. Gleysteen, John W. Gleysteen, J. C. Sinclair, Louis S. Goldberg, Alfred Pizey, Everett Waller, of Sioux City.

MAINE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Clement F. Robinson, 85 Exchange Street, Portland, Maine, for the office of State Delegate for and from the State of Maine, to be elected in 1939:

Neal A. Donahue, George C. Wing, Jr., Harry Manser and George C. Webber of Auburn;

Herbert E. Locke, James L. Reid, Joseph B. Campbell, W. R. Pattangall, Lois H. Birkenwald, E. H. Maxcy, Ralph W. Leighton, Ernest L. McLean, Sanford L. Fogg, Jr., Lewis I. Naiman, L. A. Burleigh and James H. Hudson of Augusta;

Raymond Fellows, Charles P. Conners, Frank Fellows, George F. Eaton, George F. Peabody, James E. Mitchell and Edward I. Gleszer of Bangor;

Luere B. Deasy of Bar Harbor; Arthur J. Dunton and Edward W. Bridgham of Bath; Daniel E. Crowley of Biddeford; James B. Perkins of Boothbay Harbor; Edward W. Wheeler of Brunswick;

Reed V. Jewett, John M. Dudley and Harold H. Murchie of Calais; Philip R. Lovell and Ralph E. Mason of Ellsworth; George B. Barnes, R. W. Shaw, A. B. Donworth and Thomas V. Doherty of Houlton; Albert J. Stearns of Norway;

H. P. Sweetser, Edward J. Berman, Jacob H. Berman, Harry L. Cram, F. E. Richardson, John F. Dana, Edward F. Dana, Leon V. Walker, Jr., Robinson Verrill, Leon V. Walker, H. M. Verrill, Frank H. Haskell, Leonard A. Pierce, Edward W. Atwood, Charles L. Hutchinson, Fred C. Scribner, Jr., Horace A. Hildreth, William S. Linnell, William B. Nulty, Clarence A. Brown and Porter Thompson of Portland;

Carroll N. Perkins and Bradford H. Hutchinson of Waterville.

MISSISSIPPI

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Hubert S. Lipscomb, Lamar Life Building, Jackson, Mississippi, for the office of State Delegate for and from the State of Mississippi, to be elected in 1939:

William H. Watkins, Elizabeth W. Hulen, P. H. Eager, Jr., Sherwood W. Wise, W. Calvin Wells, W. Calvin Wells, Jr., M. A. Lewis, Jr., Garner W. Green, Sr., Fred J. Lotterhos, W. E. Morse, J. M. Stevens, Jr., J. Morgan Stevens, Ralph B. Avery, J. H. Thompson, Ross R. Barnett, G. Garland Lyell, Forrest B. Jackson, Paul Chambers, Cecil F. Travis, C. L. Hester, J. T. Brown, J. C. Satterfield, Jas. A. Alexander, H. W. Hobbs, W. C. Wells, of Jackson.

C. C. Miller, J. C. Wilbourn, R. E. Wilbourn, A. S. Bozeman, Ben Cameron, Gabe Jacobson, Robert Rumley Wallace, J. C. Floyd, J. H. Currie, Marion W. Reily, H. A. Shotts, of Meridian.

R. L. Dent, R. H. Robinson, M. E. Ward, A. A. Chaney, J. H. Culkin, Edmund L. Brunini, John B. Brunini, Alex Brunini, R. M. Kelly, of Vicksburg.

NEBRASKA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Sidney W. Smith, City National Bank Building, Omaha, Nebraska, for the office of State Delegate for and from the State of Nebraska, to be elected in 1939:

R. W. Devoe, Bernard S. Gradwohl and C. Petrus Peterson of Lincoln;

Arthur C. Pancoast, George L. DeLacy, Yale C. Holland, Ralph E. Svoboda, J. A. C. Kennedy, George N. Meacham, Stanley M. Rosewater, David A. Fitch, Clinton Brome, Jos. B. Fradenburg, F. S. Gaines, Raymond G. Young, W. C. Fraser, Nelson C. Pratt, William Ritchie, Kenneth S. Finlayson, Alexander McKie, Jr., Wm. J. Hotz, Frank H. Woodland, Abel V. Shotwell, Clarence T. Spier, H. M. Johnsen, Charles S. Reed, Barton H. Kuhns, R. B. Hasselquist, Everett C. Pilcher and Edward R. Burke of Omaha.

NEW JERSEY

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Sylvester C. Smith, Jr., 763 Broad St., Newark, New Jersey, for the office of State Delegate for and from the State of New Jersey, to be elected in 1939:

Louis B. LeDuc, Wm. T. Boyle, F. Morse Archer, Jr., Mary Grisel Lyons, Frederick P. Greiner, Wm. D. Lippincott, Alfred E. Driscoll, Frank T. Lloyd, Jr., Julius Sklar, Ralph W. Wescott, Edward T. Curry, Walter Carson, Joseph L. Thomas, Floyd H. Bradley, Henry F. Stockwell, Albert E. Burling, Frank S. Norcross, of Camden.

(*Continued on page* 82)

ASSOCIATION'S COMMITTEE INTERVENES TO DEFEND RIGHT OF PUBLIC ASSEMBLY

Brief Filed by the American Bar Association's Special Committee on the Bill of Rights, as Friends of the Court, in the Appeal from the Recent Decree of Federal Judge Clark against Mayor Hague and Other Officials of Jersey City—Action of City Officials Characterized as Deliberate and Serious Invasion of Constitutional Rights—Duty of Officials to Suppress Disorders Rather than Yield to Threats—Legal Principles Involved—Davis vs. Massachusetts not Applicable, etc.

AN EVENT of great significance in the history of the American Bar Association and the relationship of lawyers to free institutions, took place on December 22nd, when the Association's Committee on the Bill of Rights filed a brief in the United States Circuit Court of Appeals for the Third Circuit, as friends of the Court, in the suit brought by the Committee for Industrial Organization, the American Civil Liberties Union, and others, against Frank Hague, Mayor of Jersey City, and others. The brief filed in behalf of the Association dealt only with the rights of public assembly under the Bill of Rights, and was widely hailed as a vital step by American lawyers in defense of liberties vouchsafed by the Constitution of the United States.

The intervention of the Association in the pending cause upon appeal was the first public step taken in pursuance of the resolution adopted by the House of Delegates last July, under the leadership of the incoming President, Frank J. Hogan of the District of Columbia, who for more than ten years advocated that the Association ought to take the lead, through some section or committee, in the active defense of human rights threatened with invasion in disregard of the guaranties of the Bill of Rights. The Junior Bar Conference had made a study of developments in New Jersey and had recommended strongly to the House of Delegates that a special committee be created to take action in defense of constitutional rights. The Association of the Bar of the City of New York, through its representative in the House of Delegates, had presented for consideration a resolution which protested vigorously against the reported denials of individual rights in Jersey City.

In his remarks on taking office, President Hogan urged that "our Association shall be alert and vigilant in defense of the rights and liberties of the individual" (AMERICAN BAR ASSOCIATION JOURNAL, August, 1938, pages 615-617), and proposed the immediate creation of a Committee "with authority to take a staunch and militant stand, after impartially ascertaining the facts." He added that "The essential things would be the Committee's complete impartiality, its high character and standing, and its fearless discharge of duty."

Later that afternoon, the House of Delegates, after debate, adopted a vigorous resolution authorizing President Hogan to appoint such a Committee (AMERICAN BAR ASSOCIATION JOURNAL, September, 1938, pages 774-775). The incoming President selected with great care a thoroughly representative Committee of nine members, under the Chairmanship of Grenville Clark of New York. Every part of the country, no less than nine states, and widely differing philosophies and relationships to the law, were represented in the following membership: Grenville Clark, Chairman, of the New York Bar; Douglas Arant, lately President of the Alabama State Bar; Professor Zechariah Chafee, Jr., of the Harvard Law School and the Rhode Island Bar; Osmer C. Fitts, of the Junior Bar Conference and the Vermont Bar; Ex-Judge George I. Haight, of the Illinois Bar; Monte M. Lemann, of the Louisiana Bar; John Francis Neylan, of the California Bar; Ex-Judge Joseph A. Padway, general counsel of the American Federation of Labor, member of the Wisconsin Bar; and Ex-Judge Ernest A. Green, of the Missouri Bar. Although Judge Green participated in the work of the Committee, he died before its brief had been perfected to the stage of signature by its members. The brief prepared and filed by the Committee as friends of the Court was the result of extensive investigation of the facts as well as the law.

The brief declares that "The Committee has no interest in this litigation save as its outcome will affect the integrity of the fundamental rights that are here in question and particularly the right of Assembly. As the *New York Herald Tribune* and other newspapers were prompt to point out, probably no group in America cares less for the CIO and its practices than the lawyers of this Committee and the Association as a whole, yet the Committee came militantly to the defense of the basic Association rights, the rights of men with whose philosophy, preachments and practices, few, if any, of the members of the Committee would generally approve. The Committee decided that in this brief it would "confine its argument to the question of public assembly." This was done "because there has been uncertainty and conflict in the decisions concerning the limits of free assembly in streets and parks and the Supreme Court has yet to speak definitely on that subject."

The filing of the brief was widely hailed as a great step in the defense of liberty and the American traditions of free speech and free assembly as basic institutions of democratic government. The clear and earnest argument of the brief was attested as an admirable exposition of the fundamental American faith. Hardly any action in the name of the American Bar Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief. It was deemed a significant step forward in the history of the Association and its relationship to public affairs. *The New*

York Herald Tribune based its leading editorial on December 23rd upon this brief as a "cause of good cheer," and praised the action of the Association as truly a reason for Christmas joy and confidence in the future of American institutions. The *New York Times* joined in the general verdict by saying, as to a brief which every member of the American Bar Association should read with a sense of pride and satisfaction in this disinterested public service so capably rendered by the organized bar:

"This brief ought to stand as a landmark in American legal history. It ought to be multiplied and spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty. It ought to be on file in every police station. It ought to be in every public library, in every school library, and certainly in the home of every voter in Jersey City."

SUMMARY OF COMMITTEE'S BRIEF*

Preliminary Statement

The Special Committee on the Bill of Rights, of the American Bar Association, was created under authority of a resolution of the House of Delegates of the Association, adopted on July 29, 1938. . . .

The general function of the Committee is to protect the fundamental rights and immunities of American citizens secured by the Bill of Rights, with authority to take appropriate action in cases deemed to present basic questions of civil liberties. Believing that this appeal involves vital issues of this character, the Committee recently voted (with the authority of the President of the Association) to apply for leave to present a brief as friends of the Court. Such application was made to this Court on December 15, 1938, and was granted.

The Committee has no interest in this litigation save as its outcome will affect the integrity of the fundamental rights that are here in question and particularly the right of assembly. Without minimizing the importance of safeguarding the right of free access against arbitrary and illegal "deportations" or the right of communication through distribution of circulars and the use of placards (covered by paragraph A, 1, 2 and 3, and by B, 1, 2 and 3, of the decree), the Committee will confine its argument to the question of public assembly. This is done because there has been uncertainty and conflict in the decisions concerning the limits of free assembly in streets and parks and the Supreme Court has yet to speak definitively on that subject.

The Committee's Position

The Committee believes that the course of conduct of the officials of Jersey City denying the right of assembly, constitute a serious abridgement of the constitutional right "peaceably to assemble" of so deliberate and important a character as to be of national consequence.

We believe this to be true because of the findings of fact of the District Court. These findings of fact include findings that the plaintiff labor organizations and the American Civil Liberties Union are lawfully organized for lawful purposes that are within "the letter and spirit of our Constitution and laws and of the theory of our democratic institutions"; that the "defendants in their official capacities have adopted and enforced the deliberate policy of forbidding the plaintiffs and persons acting in sympathy or in concert with them, from communicating their views to the citizens of Jersey City through the holding of meetings or assemblies in the open air and at public places"; that various of the plaintiffs applied pursuant to the ordinance of Jersey City for permits to hold outdoor assemblies in public places in Jersey City but that the applications were denied; that there is no proof that the parks of Jersey City are "dedicated for purposes other than the general recreation of the public"; that Jersey City has granted permits to "various persons other than the plaintiffs" desiring to speak at meetings in the Jersey City streets; that enforcement of the policies of the Jersey City officials as against the plaintiffs "results in irreparable damage to them"; and that there is no competent proof that the plaintiffs C. I. O. and American Civil Liberties Union "have so conducted themselves as to forfeit the protection of a court of equity." (See Findings of Fact, B, 4; E, 1, 2, 3, 7; F, 2, 3.)

We predicate our argument, in so far as it assumes facts, upon these findings of fact. . .

* *

We shall submit to the Court the following considerations:

First, that the integrity of the right "peaceably to assemble" is an essential element of the American democratic system.

Second, that the protection of the right of assembly provided by the District Court's decree is in harmony with the modern doctrine of the United States Supreme Court which gives a wide scope to the constitutional guarantees of freedom of speech and assembly.

Third, that the threats and alleged apprehension of disorder in this case did not justify the refusal of the permits to hold meetings, but on the contrary it was the duty of the public authorities of Jersey City to provide adequate police protection to prevent threatened disorder.

Fourth, that a city cannot wholly close its parks to public meetings for lawful purposes but must make them available for such meetings at reasonable times and places; and that the provisions of the District Court's decree so providing, in substance, are sound because necessary in order effectively to safeguard the constitutional rights of assembly and free speech. Under this head we shall point out that the case of *Davis* v. *Massachusetts*, 167 U. S. 43, relied on by the defendants, is not apposite, and shall discuss the rights of a city in respect of public meetings in streets and parks.**

It is the Committee's position that the right of assembly lies at the foundation of our system of government and that the right to hold open-air meetings in cities forms an important part of this right of assembly. It is the interference with that basic attribute of American citizenship that has convinced this Committee that there is here involved a far-reaching question, the decision of which will be of vital importance in respect of the maintenance of American civil rights.

We are confirmed in this conclusion by the very fact that the refusal of the permits for the meetings, was clearly on the ground that the persons desiring to speak were unpopular in Jersey City and that the sentiments they might utter would be unpopular. In the Committee's view, this condition *emphasizes the importance of the issue*. For if it should ever come about that

*Copies of the complete brief may be obtained by addressing the Headquarters of the American Bar Association, 1140 N. Dearborn St., Chicago, Ill.

**Having in mind that the findings and decree refer to "plaintiffs" and "defendants," we refer throughout to the plaintiffs-appellees as "the plaintiffs" and to the defendants-appellants as "the defendants."

Resolutions Adopted by House of Delegates at Cleveland Meeting

"Whereas, it is desirable that the American Bar Association shall take immediate and practical steps to assure to American citizens that whenever rights or immunities vouchsafed by the Bill of Rights are anywhere denied to any citizen or threatened with denial, there shall be a speedy and impartial investigation of the facts, and where facts warrant it, there shall be certainty of the assistance of competent lawyers and defense in protection of such rights in cases that might otherwise be undefended,

"IT IS HEREBY RESOLVED: That the American Bar Association hereby creates a special committee on the Defense of Liberties Vouchsafed by the Bill of Rights, such committee to consist of nine members and to be authorized to take such steps as it deems proper to ascertain and make public what it believes to be the facts whenever there appears to have been any substantial violation of rights vouchsafed by the Bill of Rights and to be further authorized to take such steps as it may deem proper, with the approval of the President of the Association, in the defense of such rights, in instances which otherwise might go undefended or lack adequate public presentation; such committee to be authorized to cooperate with state and local Bar Associations and with appropriate committees thereof, and to do such other things as may be necessary or proper and are authorized by the Board of Governors, to carry out the purpose of this resolution."

the law countenances the suppression of free speech on the basis of the inacceptability to the prevailing majority opinion of the speakers or their sentiments, the very basis of the doctrines on which our institutions are built would be destroyed. . .

* *

ARGUMENT

I

Freedom of assembly is an essential part of the American democratic system.

At the root of this case lies the question of the *value* in American life of the citizen's right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social.

Public information and discussion take many forms including the spoken and the printed word, the radio and the screen. But, as we later point out in detail, assemblies face to face are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history.

The right of assembly, we affirm, lies at the foundation of our system of government. The cornerstone of that system, its distinguishing characteristic, is that government—all government, whether federal, state or local—shall be based on the consent of the people. But this implies not only that the consent shall be uncoerced but also that it shall be grounded on adequate information and discussion. Otherwise the consent would be illusory and a sham.

No truth has been more strongly enforced by the history of recent years than that the suppression of discussion leads directly to tyranny and the loss of all other civil rights. On the other hand recent experience proves the necessity of a *constant process of open debate* if free government is to function effectively in a democracy. Only in this way can public opinion take shape in legislation that will command the general support which will make it law in a real sense.[1] Only so, also, can government on its administrative side be kept reasonably free from abuses. Only through free discussion, in short, can democracy function at all.

These are old truths but they need constantly to be remembered and applied.

There is a special aspect of free expression here present. The effort in this case—a successful effort until the District Court made its decree—was to suppress only *some* communications and *some* meetings. As above mentioned it is plain that the suppression was on the basis that the speakers and their probable utterances would be unpopular. And as already stated it is this very feature that gives a special importance to this case. What may be popular today may be unpopular tomorrow; and no principle could be more destructive of American free speech than to judge the permissibility of a public meeting by any standard of its popularity. The right to express unpopular opinions and to hold unpopular meetings is of the essence of American liberty. This is so not only for reasons of principle but for practical reasons of government. If criticism, however severe and unpopular, of majority beliefs were suppressed nothing is more certain than that the American system could not long survive.

It is this consideration that has been so often emphasized by far sighted men. One hundred years ago Edward Beecher (a brother of Harriet Beecher Stowe) said:

"We are more especially called upon to maintain the principles of free discussion in cases of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."[2]

The present Chief Justice, while at the bar in 1920, said:

"Hyde Park meetings and soap-box oratory contribute the most efficient safety-valve against resort by the discontented to physical force."[3]

In *De Jonge v. Oregon*, 299 U. S. 353 (1937), the Chief Justice wrote:

"Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . .

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security

1. "Satisfactory public opinion in a crisis is impossible unless both sides can present their contentions in meetings and through the press." (Chafee, *The Inquiring Mind*, (1928) p. 166.)

2. Pamphlet on the "Alton Riots," published at Alton, Ill., in 1838.

3. Brief of Charles E. Hughes in opposition to the expulsion of the Socialist Assemblymen from the New York Legislature, March 15, 1920, page 41.

of the Republic, the very foundation of constitutional government. . .

". . . The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." (pp. 364-5.)

These are the general principles that we stress in this case. The defendant officials seem to have forgotten or ignored them. They advance pleas of the unpopularity of the defendants, of objections by certain citizens of Jersey City to their sentiments and to their being heard at all. But they seem to forget that those who would suppress or abridge free speech and assembly have a heavy burden of justification and that the kind of excuses they advance must be weighed against the great consideration of preserving an underlying value of American life that is specifically secured by our fundamental law.

When all is said the preservation of free speech and assembly depends on ascribing a high *relative value* to these rights. It has recently been well said that there is only one way to safeguard open discussion, "that is, to place so high a valuation on freedom of expression in all its forms as never to practice or permit any interference with it."[4]

At the outset we wish to stress the soundness of this approach. We place a "high valuation" on freedom of expression. We believe that freedom of assembly—a vital aspect of free expression—should be upheld against intolerant and arbitrary action. It is because we hold this general point of view that we have asked leave to file this brief.

II

The protection of freedom of assembly provided by the decree of the District Court is in accord with the modern doctrine of the United States Supreme Court in its interpretation of the constitutional guarantees of freedom of speech and of assembly.

The whole recent trend of decision by the Supreme Court is to afford solid protection to the rights of free speech and assembly.

Freedom of the press and of speech and assembly are *expressly* protected by the First Amendment of the Constitution of the United States against *federal* interference. But it has required judicial interpretation to make it plain that these types of freedom were also protected by the Constitution against restrictions on the part of States and municipal governments; this principle is now, however, thoroughly established.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment provides: "Nor shall any State deprive any person of . . . liberty . . . without due process of law." In a series of cases, of which one of the first was *Gitlow v. New York*, 268 U. S. 652 (1925), the Supreme Court has held that "liberty" in the Fourteenth Amendment includes the various types of liberty of expression which are guaranteed by the First Amendment. This means, as the Supreme Court has held, that neither state governments nor city governments, which are agencies of the State, can arbitrarily or unreasonably restrict freedom of speech or freedom of assembly.

The decision which specifically referred to freedom of assembly is *De Jonge v. Oregon, supra*, decided in 1937. In this case, the Supreme Court held that a person cannot constitutionally be convicted of crime merely for assisting in the conduct of a meeting held under the auspices of the Communist Party. De Jonge had been convicted in a state court for speaking at a meeting called by the Communist Party to protest against police methods during a strike. The meeting was open to the public and the audience consisted largely of non-members of the Communist Party. Nothing illegal was said or done at the meeting by De Jonge or anybody else, and no unlawful literature was distributed there. However, the jury was allowed to consider Communist literature distributed at other times and places, and to convict De Jonge on the ground that the Communist Party had unlawfully advocated violent doctrines. As the Chief Justice said (299 U. S. at 362):

"His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party."

The Supreme Court set aside the conviction because it violated the constitutional right of freedom of assembly. The principle for which the decision stands is that a speaker cannot properly be convicted on the sole charge that he participates in a meeting *held under particular auspices;* punishment can constitutionally be based only on what is said or done at the meeting itself.

Though this is the only recent decision of the Supreme Court squarely on the question of free assembly, there are other decisions that plainly uphold the principle that expression must not be arbitrarily suppressed. Among the forms of interference with liberty of discussion which have been held void by the Supreme Court since the *Gitlow* case are statutes imposing criminal penalties for writings and speeches not clearly dangerous, sweeping injunctions against newspapers, license taxes on newspapers and ordinances requiring permits for the distribution of circulars on public streets. *Fiske v. Kansas*, 274 U. S. 380 (1927); *Stromberg v. California*, 283 U. S. 359 (1931); *Near v. Minnesota*, 283 U. S. 697 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Herndon v. Lowry*, 301 U. S. 242 (1937); *Lovell v. Griffin*, 303 U. S. 444 (1938).

Although none of the recent cases which establish the modern doctrine of the Supreme Court deals *specifically* with the subject of interference with freedom of assembly through the denial of permits for outdoor meetings, nevertheless the denial by this method of the right of assembly is closely analogous to the suppression of unpopular meetings by criminal prosecutions, which was invalidated by the *De Jonge* case. The condemnation of such suppression is also within the principle of other decisions above cited, for the suppression of public meetings through denial of permits bears a resemblance to the efforts to control the circulation of placards through permits.

The decisions just mentioned cannot be read without a realization that the Supreme Court has recently announced doctrines that go a long way to safeguard rights of the sort here involved.

4. Edward P. Cheyney, "Freedom and Restraint: A Short History," in *Annals of the American Academy of Political and Social Science*, November, 1938.

III

The threats and alleged apprehension of disorder in this case were not a valid excuse for the denial of the permits.

The defendants seek to justify their repeated denials of permits to the plaintiffs on the ground not only that they disapproved of the plaintiffs but also on the ground that certain persons and organizations of Jersey City threatened disorder if the meetings were held. From the standpoint of our Committee this is a crucial feature of the case because it involves a question that is plainly vital to the maintenance of free speech and assembly, viz., whether threatened disorder, not on the part of those desiring to speak but on the part of their opponents, constitutes a valid excuse for refusing to permit a public meeting for lawful purposes.

(a) On the facts as found by the District Court we submit that the excuse of threatened disorder must be held invalid because to uphold it would establish a precedent whereby, as a practical matter, free speech through open-air meetings might be suppressed in every city of the country. Such a result would be a blow to constitutional liberties in a vital spot.

In making this statement we do not minimize the importance of the maintenance of public order and of reasonable public tranquillity. We recognize that the right of free assembly, like freedom of speech or even religious liberty, has some limitations in the interests of public decency and order. It is, however, not necessary to speculate as to theoretical conditions which might conceivably make it impossible to provide adequate police protection. No such extreme state of facts is shown here. No evidence of police helplessness was adduced; and it appears that the denial of the permits was based on the arbitrary fiat of the Director of Public Safety constituting, therefore, an unconstitutional infringement of the plaintiffs' rights.

(b) In this matter of public meetings, a process of mutual adjustment, of give-and-take, is required on both sides. Public order and the protection of property are precious but freedom of discussion is precious also. If the latter is to be preserved some danger of disorder must be faced for the sake of the importance of the constitutional right of free assembly. It is natural that threats of trouble should often accompany meetings on controversial questions. But it is not consistent with American principles to suppress the meetings on that account. The practice under ordinary conditions in our large cities is for the authorities to arrange with the applicants to put the meeting in a suitable place, and have enough policemen on hand to quell apprehended disturbances.[5] . .

* *

We do not contend that the provisions that a permit must be applied for and that it may be refused in order to prevent public disorder are *per se* void. But we agree with the District Court that the *application* of the ordinance by the defendants in this case was plainly unconstitutional. This is so because as already mentioned no facts appear to support any claim of alleged powerlessness of the police. Moreover, the findings indicate no tendency to disorder on the part of the speakers at the forbidden meeting (See Findings of Fact of the District Court, paragraph E, 4, 5, 6) or that their *supporters* at such meetings would promote disorder. At most, it appears that *opponents* of the speakers had threatened to break up the meetings; and there is no evidence that these threats could not have been successfully resisted if the city officials had desired to provide adequate police protection. In short, no evidence appears of any *bona fide* intention or effort to protect the meetings applied for, and no evidence appears that Jersey City would have been unable to afford adequate police protection if its officials had had the will to do so. Thus the only reasonable conclusion is that the permits were refused arbitrarily and because of the "deliberate policy" of the defendants to keep the plaintiffs from being heard in Jersey City.[6]

On this state of facts the real question at issue is whether *any* threat of disorder, even though only by opponents of the speakers, excuses the suppression of open-air meetings through the denial of permits. Or, in other words, the question is whether the mere finding of the Director of Public Safety that the particular meeting cannot safely be permitted, even though unsupported by evidence, shall be deemed conclusive.

On this issue we submit that if it should be so held, viz., that open-air meetings in cities can be suppressed through the exercise of the arbitrary discretion of a licensing officer, the constitutional right of free assembly would to a large extent have become a mockery. Such a doctrine could only mean that a constitutional right is subject to destruction by an arbitrary official decision, notwithstanding that a basic object of the Bill of Rights is the purpose to protect citizens from arbitrary action of that very character. . .

(c) The constitutional doctrine for which we contend is that the public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances. It is, we submit, their duty to make the right of free assembly prevail over the forces of disorder if by all reasonable effort and means they can possibly do so.

In no other way can the right of free assembly be made a reality. Surely it must be clear that in order to "secure," i. e., make safe, the rights of free speech and assembly against "abridgement," it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small minority of persons hostile to the speakers or to the views they would be likely to express. . .

* *

If a permit can constitutionally be refused on the grounds relied upon by the defendants, a small number of lawless men by passing the word around that they intend to start a riot could prevent any kind of meeting, not only of radicals or Socialists or trade unionists, but also of negroes, of Jews, of Catholics, of Protestants, of supporters of German refugees, of Republicans in a Democratic community or *vice versa*. Indeed, on any such theory, a gathering which expressed the sentiment of a majority of law-abiding citizens would be forbidden merely because a small gang of hoodlums threatened to break up the meeting. The only proper remedy for such situations, small or

5. See the enlightening observations by a former Police Commissioner of New York City during disturbances: Arthur Woods, *Policeman and Public* (1919), pp. 73-78; his text is abstracted in Chafee, *Freedom of Speech* (1920), 177-178, and *The Inquiring Mind* (1928), 151-152.

6. "The incongruities of the various rationalizations given at the trial in support of these refusals compel the conclusion that the plaintiffs were excluded because of their aims and social beliefs rather than because of any sincere apprehension of resulting riot and disorder." Note, "The Hague Injunction Proceedings," 48 Yale Law Journal, 257, at pp. 265-266 (Dec., 1938).

serious, is the police protection to which citizens are entitled in public places, whether they are there singly or in groups.

In recently denying a mandamus to compel the issuance of a speaking permit in Jersey City to Norman Thomas, the New Jersey court spoke of the public's "right to tranquillity" as if this were the only consideration. *Thomas v. Casey*, 1 A. (2d) 866 (1938). But the assertion of the predominance of a "right to tranquillity" over the right of free discussion represents the basic error of the New Jersey decision and of the defendants' contentions here. It amounts to saying that a man can be denied freedom because of the intolerance of his opponent. The *reductio ad absurdum* of the defendants' contention occurred 100 years ago in New England when an eccentric old man was imprisoned because he persisted in wearing such a long beard that the people kept mobbing him. The authorities maintained "order" by putting him in jail. See Sears, *Bronson Alcott's Fruitlands*, c. IV (1915).

(d) It is true that there has been some confusion of thought on the question now under discussion. But the view we advance here that a meeting does not become unlawful, and therefore should not be suppressed in advance, because its opponents threaten disorder, is supported by the following authorities:

Beatty v. Gillbanks, 9 Q. B. D. 308 (1882), is the leading case. Here, the Salvation Army held a service in a public place, knowing that a parody-organization called the Skeleton Army intended to molest it. The Skeleton Army appeared, and began throwing stones. The police arrested the members of the Salvation Army for holding an unlawful meeting. The court ordered them released. It was said that unlawfulness of their conduct could not be predicated upon the intolerance of wrong-doers. See also Dicey, *Law of the Constitution*, c. VII (8th ed. 1915).

Notwithstanding the recent decision in *Thomas v. Casey, supra*, there are good statements by New Jersey judges contrary to the rationale of that case.

In *Hudson County Committee of the Communist Party v. Hague* (unreported), decided Jan. 19, 1937, Vice-Chancellor Fielder said:

"It is also the duty of the police to suppress, by arrest, if necessary, persons who may express violent disagreement with what may be said at such meetings, rather than punish those who are threatened with attack."

In *American League of the Friends of New Germany v. Eastmead*, 116 N. J. Eq. 487, 488, 174 Atl. 156, 157 (1934), Vice-Chancellor Bigelow said:

"If lawless elements in the community, instead of ignoring such propaganda, or meeting it by sound argument, resort to riot, it is the duty of the police to protect the lawful assemblage and to repress those who unlawfully attack it."

* *

IV

A city cannot constitutionally close both its streets and its parks to public meetings. In view of the importance of open air meetings as a means for public discussion a city must at least make its parks, dedicated to general public use, available for such meetings at reasonable times and places. The provisions of the decree of the District Court in this regard are necessary to safeguard the constitutional rights of assembly and free speech.

* *

It is important to analyze the precise effect of the District Court's decree with reference to meetings in streets and parks. The District Court has decreed in substance that as long as a city pursues the policy of permitting *some* street meetings, it must apply such policy without discrimination. On the other hand, the effect of the decree, by implication at least, is that there is no constitutional objection to a *total* closing of all the streets of a city to all meetings. (See Decree, B, 4 (d)).

With reference to parks dedicated to general public uses, however, the decree provides in substance that the city *must* open them for public meetings at reasonable times and places and must provide proper police protection to prevent disturbances. (See Decree, B, 4 (a), (b)). . .

We do not deem it necessary to discuss at length this question of the constitutionality of an ordinance totally closing a city's streets. Jersey City has adopted no such policy and the decree is at least correct in providing that while the streets are held available for *any* meetings, there shall be an equal opportunity to all groups.

But the very fact that it *might* be constitutionally unobjectionable to forbid all public meetings in the *streets* of a city serves to emphasize the absolute necessity of keeping open some other means for holding outdoor public meetings in our larger cities. As a practical matter a city has a virtual monopoly of every open space at which a considerable outdoor meeting can be held. At least it has a practical monopoly of all such places that are dedicated for public use and that would not need to be hired. If, therefore, it should be held that a city can constitutionally close *both* its streets and its parks entirely to public meetings (so that every foot of every public street and of every public park, irrespective of conditions and suitability, would be made forbidden ground), the practical result would be to make impossible any open-air meetings in all large cities. The effect would be to cut off a means of public discussion and education that has always been of vast consequence to the American people. Such a result would, we submit, constitute an unconstitutional abridgement of the rights of free speech and assembly. It follows, we contend, that a city *must* make some reasonable provision for the holding of outdoor public meetings. If it chooses to close its streets to such meetings and can constitutionally do so, it *must* make its parks available at reasonable times and places.

* *

[After discussing the importance of outdoor meetings as a medium of public discussion, the brief continues.]

We stress these considerations because no less an issue is here involved than the constitutional power of a city to suppress, as a practical matter, substantially all outdoor public discussion within its limits. It is because such a policy would cut off one of the most vital and important means of public discussion that it would clearly "abridge" the rights of free speech and assembly guaranteed by the Constitution.

c. Davis v. Massachusetts, 167 U. S. 43, relied upon by defendants, is distinguishable in respect of its facts and the issue involved. Moreover, its rationale is incompatible with more recent decisions of the Supreme Court. A city does not control its parks like a private owner of property, but holds them for public purposes including public meetings.

It is true that forty-one years ago (long before the above mentioned *Gitlow* and other cases had brought

(*Continued on page 73*)

APPROVED LAW LISTS

Law Lists as Approved for the 1939 Editions—Reasons for Rules and Standards Set Forth—What the Lists Were Called on to Do in Order to Secure Inclusion in the Association's List—Former Conditions as Contrasted with Present Situation—Need for Continued Supervision of Field—Committee Supplements Statements Heretofore Made and Invites Cooperation of Lawyers in its Work

By Hon. Frank E. Atwood
Chairman Association's Special Committee on Law Lists

THE evolution of law lists has been a source of difficulty and misunderstanding for many years. From time to time the American Bar Association has dealt with various phases of the subject but not until 1935 did it undertake to make a thorough investigation and study of it as a whole. At that time a Special Committee on Law Lists was appointed upon which Honorable Earle W. Evans, a former President of the Association, served as Chairman. This Committee's work culminated in the Association's adoption of its report in 1937, which included the present Rules and Standards as to Law Lists. Thereupon, the present Committee was created, clothed with the powers and charged with the duties enumerated in its predecessor's report. A. B. A. Rep., vol. 62, pp. 344-50.)

Paragraph 4 of the Rules and Standards provides that they shall "be effective as to Law Lists published, circulated or maintained on or after July 1, 1938"; and Canon 43 of the Association's Canons of Ethics provides that "It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association." (A. B. A. Rep., vol. 62, p. 766.) Obviously this Committee's most pressing obligation was to develop an adequate organization for the proper and timely investigation, consideration and ruling of applications for the approval of law lists. Such an organization was perfected and in that work the Committee has been chiefly engaged for the past year.

In the course of accomplishing this objective, and for the purpose of facilitating observance of Canon 43, the Committee announced and published at the close of the Association's annual meeting at Cleveland, and as of July 29, 1938, the names of the law lists, 40 in number, which upon application, investigation and careful consideration seemed able and willing to conform to the Association's Rules and Standards. Since that publication applications for the approval of other law lists have been presented and further investigations made, and at its meeting on November 26, 1938, the Committee approved the 1939 editions of the law lists named in the following roster of approved law lists, and ordered that the same be published:

ROSTER OF LAW LISTS APPROVED NOVEMBER 26, 1938, AS TO 1939 EDITIONS, BY THE SPECIAL COMMITTEE ON LAW LISTS OF THE AMERICAN BAR ASSOCIATION

General Law Directories

Martindale-Hubbell Law Directory, 21 West Street, New York City.

Selective General Law Lists

American Bank Attorneys, 18 Brattle Street, Cambridge, Mass.

The American Bar, Fawkes Building, Minneapolis, Minn.

American Counsel Association, Statler Building, Boston, Mass.

The Bar Register, 21 West Street, New York City.

Campbell's List, 140 Nassau Street, New York City.

The Expert, 505 Minnesota Street, St. Paul, Minn.

The Lawyers Directory, 18 E. 4th Street, Cincinnati, Ohio.

The Lawyers List, 70 Fifth Street, New York City.

Russell Law List, 527 Fifth Avenue, New York City.

Standard Legal Directory, 261 Broadway, New York City.

Sullivans Law Directory, 33 S. Market Street, Chicago, Illinois.

Selective Insurance Law Lists

American Insurance Lawyers Association, 410 Main Street, Peoria, Illinois.

Best's Recommended Insurance Attorneys, 75 Fulton Street, New York City.

Hine's Insurance Counsel, 38 S. Dearborn Street, Chicago, Illinois.

The Insurance Bar, 343 S. Dearborn Street, Chicago, Illinois.

Selective Commercial Law Lists

American Lawyers Annual, N. B. C. Building, Cleveland, Ohio.

American Lawyers Quarterly, N. B. C. Building, Cleveland, Ohio.

A. C. A. List, 92 Liberty Street, New York City.

Attorneys List (U. S. F. & G.), Redwood and Calvert Streets, Baltimore, Md.

The B. A. Law List, Plankinton Building, Milwaukee, Wis.

Clearing House Quarterly, Fawkes Building, Minneapolis, Minn.

Columbia List, 320 Broadway, New York City.

The Commercial Bar, 521 Fifth Avenue, New York City.

The C-R-C Attorney Directory, 50 Church Street, New York City.

FORWARDERS LIST OF ATTORNEYS, 38 S. Dearborn Street, Chicago, Illinois.

THE HAYTHE GUIDE, 261 Broadway, New York City.

INTERNATIONAL LAWYERS LAW LIST, R. K. O. Building, New York City.

THE MERCANTILE ADJUSTER, 10 S. LaSalle Street, Chicago, Illinois.

THE NATIONAL LIST, Empire State Building, New York City.

THE UNITED LAW LIST, 280 Broadway, New York City.

WILBUR DIRECTORY OF ATTORNEYS AND BANKS, 299 Broadway, New York City.

WRIGHT-HOLMES LIST, 225 West 34th Street, New York City.

ZONE LAW LIST, Louderman Building, St. Louis, Missouri.

Foreign Law Lists

CANADA BONDED ATTORNEY, 57 Bloor Street, Toronto, Canada.

CANADA LEGAL DIRECTORY, 57 Bloor Street, Toronto, Canada.

CANADIAN LAW LIST, 24 Adelaide Street E., Toronto, Canada.

DIARY FOR LAWYERS, 2 Chancery Lane, London, England.

EMPIRE LAW LIST, 4 Bell Yard, Temple Bar, London, W. C. 2, England.

INTERNATIONAL LAW LIST, 104 High Holborn, London, W. C. 1, England.

KIME'S INTERNATIONAL DIRECTORY, 75 Fairfax Road, N. W. 6, London, England.

THE LAW LIST, 119 Chancery Lane, London, England.

THE SCOTTISH LAW DIRECTORY, 12 Bank Street, Edinburgh, Scotland.

THE SCOTTISH LAW LIST, LTD., 27 Thistle Street, Edinburgh, Scotland.

The following form of certificate was issued to each law list so approved:

"The Special Committee on Law Lists of the American Bar Association, pursuant to the Rules and Standards of the Association as to law lists, has approved the 1939 edition or editions (including supplements, if any) of (name of law list approved).

"This approval is not an estimate of the productivity or value of the aforementioned publication to subscribers or listees."

The term law lists, as defined in the Rules and Standards, embraces directories, but for purposes of identification and ready reference the names included in the above roster are grouped under popular classifications and may be summarized as follows:

1 General law directory.
11 Selective general law lists.
18 Selective commercial law lists.
4 Selective insurance law lists.
10 Foreign law lists.

The foregoing approvals were granted in accordance with I (g) of the Evans Committee Report, as adopted by the Association which authorizes, empowers and directs the present Committee to "approve such of the Law Lists as are found, upon such investigation, to have complied with the rules and standards of the Association and the regulations of the Committee, and revoke, conditionally or otherwise, the approval of any such Law List if the committee finds that the issuer thereof has, after approval, violated any of such rules, standards or regulations."

Some may say that the approval of fewer lists would have better met the needs of the legal profession and the public it serves. Whatever the answer may be, the Committee believes it should be given in the light of subsequent experience in the actual operation of the Rules and Standards rather than by hazarding a guess at this time.

Present and Past Conditions Compared

It appears from data compiled by the Association's present Special Committee on Law Lists, and its predecessor Committee, that approximately 260 compilations, which would fall within the definition of law lists, have been circulated or promoted some time during the past ten years. At least 251 of these may be roughly classified as follows:

4 General law directories.
72 Selective general law lists.
83 Selective special law lists.
63 Selective commercial law lists.
29 Foreign law lists.

Such a number was obviously far in excess of the needs of the legal profession or the public which it served. The rank abuses which developed in this highly competitive and unstandardized field, particularly reflected in unethical conduct of lawyers and unauthorized practice of the law by laymen, led the American Bar Association to create the Evans Committee in 1935. In its report to the Association in 1936 (Rep. A. B. A., Vol. 61, p. 844), this Committee stated that "Estimates of the aggregate amount of money that members of the bar of the United States actually pay annually to Law Lists run as high as fifteen million dollars." The nation-wide study and investigation of law lists by national, state and local bar associations then in progress, and the helpful response of individual lawyers, forwarders and many laws list publishers forced many of the worst offenders to retire from the field. The present committee has sent forms of application and questionnaire to every law list that could be located and appeared to be then active, about 160 in all. Less than one-third of that number sought approval, and from those applying some interesting estimates were derived.

For instance, the total amount of fees which these lists contracted for with lawyers in payments for listings and books in 1936 was estimated in the committee's 1938 report (Adv. Program, p. 194) to be $1,665,000; the aggregate amount of business forwarded over the commercial law lists, approximately $90,000,000; and that over the non-commercial lists twice as much, making the estimated total amount of the business annually forwarded over the law lists that have sought approval $250,000,000.

Taking these estimates for whatever they may be worth, the fact remains that instead of 260 unidentified, unstandardized and unregulated law lists competing for business from lawyers generally credulous, indifferent or uniformed as to the real function, character and worth of such media, members of the bar may now properly and safely confine their attention to the 34 domestic and 10 foreign lists that the Committee has approved. Lawyers can and will now be more discriminating in their evaluation and choice of listings. This contrast alone well justifies the work of the American Bar Association in law list matters to date.

General Prerequisites of Approval

The general method pursued by the Committee in its investigation and approval of law lists may be gathered from its annual report (Adv. Prog. 1938, pp. 193, 194), and remarks of the Chairman before the General Assembly (Aug. Journal, p. 678). Some particulars may now be helpful.

Except for certain conditions applicable to individual lists, which have also been submitted to the publisher, the Committee has formulated eighteen propositions in which it has incorporated its understanding and interpretation of the Rules and Standards.

Before the law list publishers were called upon to take the necessary measures to comply with the requirements for approval they had already been given ample opportunity to present their problems and such difficulties as, at least some of them felt, lay in their way toward a full and unreserved compliance. The Committee has always felt that it should seek to be cooperative and helpful and has avoided what might appear to be an arbitrary or dictatorial attitude. If the publishers of these lists are earnestly seeking to render a public service in a spirit of mutual accord then it behooves the bar to do its part in protecting the lists that are worthy, thereby protecting its members and the public as well from fraudulent or unworthy lists. The Committee has found in its investigation that the management of the lists is usually capable, alert, and honest, and fully conscious of a responsibility to the public, and happily in accord with what the Association is now seeking to do to establish the law list business on a higher level than it has heretofore known.

It is therefore with a certain satisfaction that the Committee is now in a position to make known to the entire membership of the Association the requirements which it submitted to those publishers who applied for approval of such editions of their lists as are to be published on and after the 1st day of January, 1939. We trust the readers of the JOURNAL will avail themselves of what we believe to be an opportunity to know just what may be expected of a law list which has complied with the rather exacting requirements which the Association has seen fit to adopt as a measure for approval.

These requirements with explanatory comments follow under appropriate subheads:

Composition:

(1) The list shall not be published or issued as a part of any professional, commercial, trade, or business publication or journal.

(2) In the physical make-up of the list or directory, no preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different sizes or character of type, underscoring, or other methods employed by printers for emphasis or to attract attention; and the professional card published in its geographical or other section shall conform to the requirements of the Canons of Professional Ethics. (See Canon 27.)

These requirements are substantially verbatim recitals of paragraphs (e) and (g) of Section 3 of the Rules and Standards. In recent years lawyers have been invited to subscribe to rosters published as a section, and usually an unimpressive section at that, of innumerable trade and professional journals, rating books, law digests, and the like. Most of these rosters certainly are of no practical value or consequence, but quite to the contrary they have rather definitely established themselves as nuisances. No. (2) will eliminate preferential listings which have become through abuse in some instances, a delusion and a snare, and in others, the laying of the foundation for a certain amount of coercion at the expense of the attorney and for the benefit of the publisher. The opportunity has not been abused by all publishers but the reason for the rule is as sound as it is obvious.

Burden of Proof on the Issuer:

(3) The issuer shall have supplied the Committee with such information as it has requested, pertinent to matters within its scope.

(4) The issuer shall have submitted to the Committee, and prior to its publication, the Committee shall have approved:

(a) The preface, introduction, and foreword, as well as other remarks or statements which are to appear in the book, in explanation of its contents, use, purpose, etc.

(b) The digest of laws.

(c) Each advertiser and each advertisement.

(d) Each statement, representation, or presentation which the publisher is presently using or which he intends to use for the purpose of promoting or advertising the list, with and among users and lawyers.

Space will not permit an extended discussion of the above conditions. Suffice it to say the Committee was in instances amazed at the apparent lack of consistency between the table of contents and the actual contents of some of the lists. As a matter of fact, there seemed to be no relationship whatever. Books carrying the names of lawyers ostensibly engaged in admiralty, probate, corporation, and other designations of specialized practice contained what might be termed general practitioners without any reference in the biographical sketch to any of the specialties referred to in the table of contents. The Committee likewise discovered legal digests which had not been revised over a period of years.

Evidence of Compliance in Advance of the Issuance of the 1939 Editions, with Certain Rules of Conduct and Specifications for Approval.

The issuer shall also have satisfied the Committee, prior to the publication of the next edition, that

(5) Subsequent to July 1, 1938, the list has been conducted, and in the future will be conducted upon a basis which tends to promote the public interest and has not employed since that date, and will not in the future employ any practice not in accord with a high standard of business conduct.

(6) Subsequent to July 1, 1938, it has not done, caused, permitted to be done, encouraged, or participated, and in the future will not, in connection with the preparation, publication, distribution, or presentation thereof, do, cause, permit to be done, encourage, or participate in the doing of any act or thing which, directly or indirectly, violates the Canons of Ethics of the American Bar Association, or which constitutes the unlawful practice of the law.

(7) Subsequent to July 1, 1938, the issuer has recommended, and in the future will recommend the purchase or use of the list to attorneys at law, or to laymen, only on the basis of the circulation, physical make-up, and accuracy thereof, and the extent to which lawyers listed therein have been investigated; and since that date has not endeavored, and in the future will not endeavor otherwise to secure

employment for any attorney listed therein or presented thereby.

(8) Subsequent to July 1, 1938, neither user nor attorney has assumed nor in the future will assume any obligation to employ, exclusively or preferentially, in the forwarding, receiving, or exchange of legal business, the attorneys listed therein.

(9) Subsequent to July 1, 1938, the issuer has not endeavored, and in the future will not endeavor to direct or control the professional activities of any attorney listed therein or presented thereby.

(10) Subsequent to July 1, 1938, the issuer has not neglected or refused and in the future will not neglect or refuse to promptly and fully (a) notify the Committee, in writing, of any payment or payments made by such issuer, or by an indemnitor, upon the claims of defalcation by a listed attorney or (b) to cooperate, at the request of the Committee, in the investigation, ascertainment, and proof of the facts of such claims.

(11) The lawyers listed have been selected with care and with a view of rendering to the users of the book intelligent and expeditious service; and the surname, given and other names, initials, and the firm names of lawyers, and their several addresses, and any biographical or other matter as published in the list are currently correct.

(12) Subsequent to July 1, 1938, no new contracts have been made, whereby the issuer, unless otherwise first specifically authorized by the Committee so to do, has agreed to list as available for employment, any person or persons other than lawyers and only lawyers licensed to practice at each point for which listed directly or indirectly.

(13) Assurance is given that no lawyer will be listed without his knowledge or over his protest, after January 1, 1939.

For obvious reasons No. 13 does not apply to a directory which presumes to list the names and addresses of all lawyers either in general practice or in a given specialty. In such cases, of course, the Committee has satisfied itself that the publisher has the facilities and the requisite knowledge and experience to compile and issue such a publication.

(14) The lawyers listed have been selected at representative points and so that the area, or the number of points referred to one listee is reasonable as measured by consideration of the public interest, it being presumptively unreasonable to refer unlisted points a greater distance than 25 miles.

(15) The contract for listing has not been made, since July 1, 1938, by or in behalf or in the interest of, directly or indirectly, any person other than the listee.

(16) Since July 1, 1938, no contracts have been entered into, wherein the price for representation or listing therein is not uniform within reasonably prescribed areas or is exorbitant; and neither the listing, nor copy of the list or publication, nor biographical or other matter is published, nor any other service of any kind rendered free to one of those listed in any locality with a charge therefor in the case of another listee.

(17) Any rating or estimate of financial worth or legal ability has been based upon careful, adequate, and thorough investigation, and has been reasonably and impartially made.

(18) The publisher is financially responsible and possesses the essential facilities and equipment, including a sufficiently large and experienced personnel, to adequately print, distribute, and promote the list.

The foregoing propositions require very little, if any amplification. They will impress the reader as basic and elementary. Many of them, such as 11, 13, 14, 16 and 17, are primarily in the public interest. The publisher is not expected to hedge himself about with unworkable restrictions, but he should be prepared to meet the demands of the more exacting standards of behavior which, through the years, the bar has seen fit to impose upon its members and which, in its dealings with others, must not be compromised.

Expense of Investigating Applications for Approval

The task of fully investigating applications filed with the committee for approval has been one of considerable magnitude and expense. Facilities had to be provided to make a searching study and fair appraisal of the nature, purpose and character of every list for which approval might be sought, its history and practices, rates charged, financial responsibility, and its managerial and sales force, as well as the mechanical set-up of the list as published and circulated. Much data had to be gathered and carefully analyzed in the light of its relevancy to the requirements of the Association's Rules and Standards. Many visits and conferences at different places were necessary, and all activities coordinated to the end that every application be fully and fairly investigated, considered and ruled as nearly as possible in accordance with the ends apparently sought to be attained by a practical administration of the Rules and Standards.

The Committee deemed it unwise to enter upon such an undertaking without the aid of a full time secretary, and employed Martin J. Tiegan in that capacity, who, in addition to some years of experience as a lawyer in the commercial field, had long served as Secretary of the Commercial Law League of America, and was thoroughly conversant with the law list problem from every angle. As such he has developed and maintains at 209 S. LaSalle, Chicago, adequate facilities at moderate cost for dispatching the Committee's work, and is of invaluable assistance.

In order to insure independence of action and uninterrupted prosecution of the Committee's entire work the Board of Governors early in the associational year of 1937-38 made an appropriation for that year out of the Association's funds entirely adequate for all purposes. Subsequently, at the Cleveland meeting in July a new appropriation was made commensurate with all estimated needs for the associational year 1938-39. All expenses incurred by the Committee are audited and paid by the American Bar Association out of such appropriations, in accordance with the Association's usual routine in such matters. Paragraph I (f) of the Evans Committee Report, however, directs the present Committee to "investigate, at the expense of the respective applicants, applications received for the approval, by the Association, of Law Lists." However desirable it might be that the Association bear all expenses incurred by this Committee, such was evidently not deemed practicable. This direction was obviously intended to relieve the Association of expenses connected with such investigation. Consequently, the Committee requires that this part of its expense be ultimately borne by the applicants for approval. The total amount thus far collected from such law lists is between nineteen and twenty thousand dollars.

Further Work of the Committee

Now that the initial task of investigating, considering and ruling applications for approval is accomplished, the Committee can give more attention to other things it is authorized, empowered and directed to do in aid of administering the Rules and Standards.

Not only must it be equipped and prepared similarly to deal with further applications for approval, but, for a time at least, the lists already approved must be carefully supervised and the bar fully enlisted in support of the broad policy initiated. In granting approvals to law lists, which have applied heretofore, and in applying to law lists for the first time, rules and standards prescribed by the Association which have never heretofore been operative, the Committee has felt that in fairness to established businesses upon which lawyers and the forwarding public have become accustomed to reply, it must give great regard to prima facie or presumptive showings of ability to publish a law list and to distribute, circulate, and maintain it conformable to the rules and standards. This means, of course, that some law lists may be approved which will later find that they can not profitably exist under the rules and standards, but if a satisfactory preliminary showing is made the Committee has felt that it could not be arbitrary in its action and could not base its action too largely on the results of past operations under an entirely different set of conditions and circumstances.

As a part of the Committee's future program, it is planning to definitely check the utility of law lists, the extent of their use by the forwarding public, the value they give to their listees, the manner in which they conduct their complaint and other departments, the extent and manner in which they distribute the list and promote its use and in other possible ways to determine whether the preliminary showing made is borne out by actual operation and experience.

The approvals issued are in a sense temporary in character. Each future list must also be approved by the Committee and any list which fails in any respect to conform to the rules and standards will lose its approval. The continuing investigation of lists which the Committee will make, based on the operation of the rules and standards, which become fully effective for the first time on January 1, 1939, will undoubtedly result in future curtailment of the number of lists serving the field. Any such curtailment, however, must naturally and necessarily—and in all fairness to the lists—be based upon the results of their operations under the new rules and standards and not upon the Committee's speculation, attempt to prophesy or upon its best judgment based upon past performance under substantially different conditions.

The Committee should also further service the bar by establishing an Information Bureau to which matters pertaining to law lists may be referred and answered by the Secretary of the Committee, who will also be in position to supply inquiring attorneys with information concerning each law list that has been approved. Much data has already been procured and is now available. Such service is well within the Committee's prescribed duty (Par. I(a)) to "procure information regarding Law Lists and from time to time advise members of the Association thereof," also, (d) "endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, Law Lists"; and, (e) "cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fraudulent or unworthy conduct."

The Committee is still firm in the belief that most of the vexing problems that have attended the publication and use of law lists can be solved by intelligent, energetic and persistent application of the educational and administrative means already provided by the American Bar Association. The paramount consideration now is that the entire bar interest and inform itself as to the program and avail itself of the means now at hand. To this end all are invited to call upon this Committee for any assistance it can render.

STATE BAR EXECUTIVES HOLD CONFERENCES

STATE Bar Association organizations took a historic step at Kansas City, Mo., on Sunday, November 13, 1938, when the executive representatives of nine different State associations spent a day in conference on the best methods of operating their associations.

The conference was called by the Section of Bar Organization Activities of the American Bar Association. The eight members of the Council of that Section have each assumed responsibility for a portion of the country. Burt J. Thompson of Forest City, Iowa, has charge of the State and local bar associations in the Eighth Federal Circuit, and W. E. Stanley of Wichita, Kan., the associations in the Tenth Federal Circuit. These two council members combined in calling a meeting of the executives of the State Bar Associations of the thirteen States of these two circuits. Charles O. Rundall, Vice President of the Illinois State Bar Association and R. Allan Stephens, Secretary, and also Chairman of the Section on Bar Organization Activities of the American Bar Association, sat in the conference.

It was distinctly understood that there were to be no prepared speeches and the meeting resolved itself into an informal conference upon subjects of mutual interest. Each president told of the type of his State Bar Organization, which statements showed that one association was integrated by legislative enactment, one by Supreme Court ruling, a third is now being changed from a voluntary bar association into an integrated bar by virtue of the passage of an act vesting the power to organize in the Supreme Court, and the remaining five were voluntary bar associations. A further exchange of views developed that only two had district organizations affiliated with the State bar organization, and this led to a discussion of methods of coordinating State and local bar associations.

The outstanding activity of the American Bar Association at the present time is the development of Post-Admission Legal Education. The historical background of this movement was given by W. E. Stanley and methods of adapting the movement to local bar associations in the smaller communities were presented by Burt J. Thompson, Chairman of the Committee on Post-Admission Legal Education of the American Bar Association's Legal Education Section. Mr. Thompson gave a vivid description of the plans used by the Iowa State Bar Association to educate the lawyers in

smaller communities, and it was almost noon before the barrage of questions on these methods had ended.

The publication of a State Bar Association magazine was then discussed. An exhibit of thirty different magazines was examined by those preesent, and questions were asked and answered about cost of publication, cooperation with law schools in publication, advertising rates, style and format of journals, and other similar matters. The group then adjourned for lunch.

Promptly at 1:30 P. M. the conference reconvened taking up a discussion of methods of maintaining a central office, the adaptation of the section system of organization to State Bar Associations, and a discussion of incidental features of State Bar Association activities such as fee schedules, scrapbooks of office forms, employment services, legal publications committees, pension funds, relations with the law schools, economic surveys, legal aid, and public relations. Forms used by different associations and informal presentations of solutions to these problems proved to be of such interest to the executives that there was not a pause until the chairman announced, at 4:00 P. M., that the time for adjournment had arrived.

After adjournment the executives did not immediately disperse but for another hour or so remained to ask further questions about some particular feature of State Bar Association methods in which they were particularly interested.

President Inghram D. Hook of the Missouri State Bar Association and Mrs. Hook entertained the group at a dinner at their lovely home, and as the last members of the group were separating at the Union depot one executive, who had traveled over 600 miles to get to the meeting, expressed the common opinion of those present when he remarked, "Well, I learned more today about how a State Bar Association should be run than I have learned in all of my years of living with the game."

The Section of Bar Organization Activities plans to hold similar conferences with State Bar Executives in other Federal Circuits if desired by State Associations.

SECOND REGIONAL CONFERENCE HELD AT COLUMBUS, O.

Twenty-nine State Bar Association representatives from the States of Kentucky, Tennessee, Pennsylvania, Michigan, Ohio, Indiana, Wisconsin, and Illinois attended the second regional conference of the Section of Bar Organization Activities of the American Bar association held at Columbus, O., Dec. 11. The conference was called by Carl B. Rix, Milwaukee, Wisconsin, and Forest G. Moorhead, Beaver, Pennsylvania, members of the Executive Council of the Section, with R. Allan Stephens, Springfield, Illinois, Chairman of the Section, presiding.

Following the procedure of the conference held last month at Kansas City, the Columbus conference was devoted to informal discussion of forms of bar organization and activities programs. Of the eight bar associations represented, two reported integrated bars in their States and three of the remaining voluntary associations represented reported active campaigns for integration in their States.

A high point of the conference was the discussion of the activities of the organized bar in the field of advanced legal education, with Burt J. Thompson, former President of the Iowa State Bar association and member of the Section Council, Will Shafroth, adviser to the Council on Legal Education of the American Bar Association, and Dean Albert J. Harno of the University of Illinois law school and second vice-president of the Illinois State Bar association, discussing practical suggestions for conducting legal institutes and other methods of promoting advanced legal education for lawyers.

Carl B. Rix, member of the Board of Governors of the American Bar association, presented the matter of cooperation in putting into effect the recommendations for improvement of judicial administration brought forward by the Section of Judicial Administration of the Association. Other activities discussed included bar journals and association publicity, central office maintenance, section organization, economic surveys of the bar, unauthorized practice of the law, schedules of fees and charges, law office form books, legal publications, public relations, bar pension funds, and student bar associations in law schools.

Henry S. Ballard, Columbus, member of the Board of Governors of the American Bar association, entertained the conference at luncheon, and President Howard L. Barkdull, Cleveland, of the Ohio State Bar association, was host to the group at a dinner held at the Columbus club. At the conclusion of the discussion portion of the meeting, President Leonard J. Crawford of the Kentucky State Bar association invited the conference to meet in that state in 1939.

ANNOUNCEMENT OF 1939 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts"

Time when essay must be submitted:

On or before March 1, 1939.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish further information and instructions.

PREPARING FOR THE SIXTY-SECOND ANNUAL MEETING AND "SAN FRANCISCO KNOWS HOW"

President Riordan of the Bar Association of the City of San Francisco Names Important Committees—Meetings to Be Held in Municipal Opera House and Veterans Building—Wealth of Scenic and Other Attractions Available Makes the Problem of Entertainment Merely One of Selection—Gigantic Bridge the City's Latest Achievement—Association Program to Be Constructive and Full of Interest

PREPARATIONS are under way to make the coming Annual Meeting of the American Bar Association at San Francisco one of the biggest and most enjoyable on record. Those who attended the meeting held in that city in 1922 need no assurance as to what San Francisco is capable of, and those who did not, but attend the meeting this year, are certain to have a series of delightful revelations. San Francisco not only has convention facilities equal to any demands that may be made upon it, but also a variety of local scenery and points of interest hardly equaled anywhere else in the country.

The officers of the American Bar Association have selected the beautiful Municipal Opera House for the holding of the opening meeting and the subsequent meetings of the Assembly, in which every member is entitled to participate. The House of Delegates and the various sections will meet in the Veterans War Memorial Building, which, with its auditorium and numerous smaller halls, is admirably adapted for that purpose. The headquarters of the Association during the meeting will be at the Palace Hotel.

The Bar Association of San Francisco has swung into action and President John H. Riordan has already announced the selection of two important committees—Finance and Arrangements—for the coming Association meeting. Mr. Arthur W. Brouillet, former President of the Bar Association of San Francisco, is Chairman of the Finance Committee and Mr. Delger Trowbridge will head the Committee on Arrangements. Other committees having charge of the multiple activities connected with the reception and entertainment of the Association will be announced in due course.

The program for entertainment is already under consideration and here the problem is largely one of selection. From the standpoint of sight-seeing alone, San Francisco has a wealth of entertainment to offer. A trip over the Golden Gate Bridge to Muir Woods, one over the new San Francisco-Oakland Bay Bridge to the University of California, another down Skyline Boulevard to Stanford University, have been suggested. And sight-seeing tours of San Francisco will naturally include its water front, Marina, Knob Hill, Presidio, Seal Rocks, Golden Gate Park, Fleischhacker Zoo, St. Francis Woods, Twin Peaks, and Mission Dolores.

But this merely scratches the surface of what San Francisco has to offer to the visitor. He will hardly fail to see the civic center, one of the really outstanding groups of civic structures in the world, consisting of the City Hall, the State Building, the Federal Building, Exposition Auditorium, the Veterans Building, the Opera House, the Health Center and the Public Library. He will also want to see Chinatown, the largest Chinese community in the world outside China, with its shops, temples and theatres; the Latin quarter—a bit of old Italy, famed for Bohemian restaurants and Italian dishes; the Coit Memorial on Telegraph Hill from which a breathless view of San Francisco can be obtained; the fishermen's wharf, miniature Italian harbor, gay with color and activity; Fort Mason and the Transport Docks; beautiful residence-lined Marina Boulevard bordering the Bay, and the extensive yacht harbor filled with sailing boats and motor crafts of all descriptions.

And there is the Golden Gate Bridge, the greatest single-span bridge ever constructed, connecting San Francisco with Marina County on the north; the new San Francisco-Oakland Bay Bridge—the mightiest bridge in the world—stretching eight and a half miles to Oakland and the other East Bay cities; and Treasure Island, the largest island ever built by man, site of the Golden Gate International Exposition in 1939. These and other things too numerous to mention will help provide the entertainment and relaxation which always accompany a meeting of the Association.

It is, of course, too early to give even a tentative program for the meeting, but this, too, is under consideration and will be announced as soon as the main outlines are determined. Members may be assured that it will contain a list of distinguished speakers whom they will be glad to hear, as well as a series of important subjects for consideration at the annual meeting.

But it is for San Francisco to invite you to accept its hospitality and here is the invitation itself, issued by the very active Convention Bureau of that city. But a little word of warning may be in order: Remember that the Annual Meeting of the American Bar Association will not be held until July, so do not be carried away and pack your grips at once. And hold on to your hats!

INVITATION TO SAN FRANCISCO

One of the key cities of America—the New York of the Pacific—invites you.

Of course, San Francisco is no more New York than New York is Paris. It is San Francisco—last outpost and westernmost metropolis of the white race—as America faces the Pacific and Asia from this premier seaport of the Western ocean.

Stripped of its financial, commercial and maritime supremacy, San Francisco would remain what it will always be—one of the most spectacularly beautiful cities of the world.

There's a reason why travelers touring America fall in love with San Francisco.

Come and see for yourself.

Inhale the tonic air from six thousand miles of ocean. Stand on one of the city's high hills—it's a hill town like Rio or Rome—and let the panorama of ocean, bay and mountains strike you with its glory.

Come to San Francisco and go abroad—in your own land. Find out that America, too, has a city of glamour and beauty and strangeness—but a city where they speak your language, think your thoughts, are friendly as only healthy, happy, tolerant, beauty-beguiled Americans can be friendly.

* *

And see all of California—from its heart at San Francisco. Yosemite lies straight east. Del Monte, Monterey, Carmel—the coast line celebrated by poets and haunted by ghosts of the Spanish padres and dons—lies three hours to the south. The great redwoods, oldest of living things, begin right in San Francisco's suburbs. Tahoe and the high Sierra are only a few hours away.

See, too, Los Angeles and its beautiful suburbs—Hollywood, Pasadena, Santa Barbara. See San Diego.

* *

But you'll need no thing that San Francisco itself does not offer for a richly rewarding holiday. You'll get your best times in San Francisco. Generations of Westerners and men from all the Seven Seas discovered that long ago.

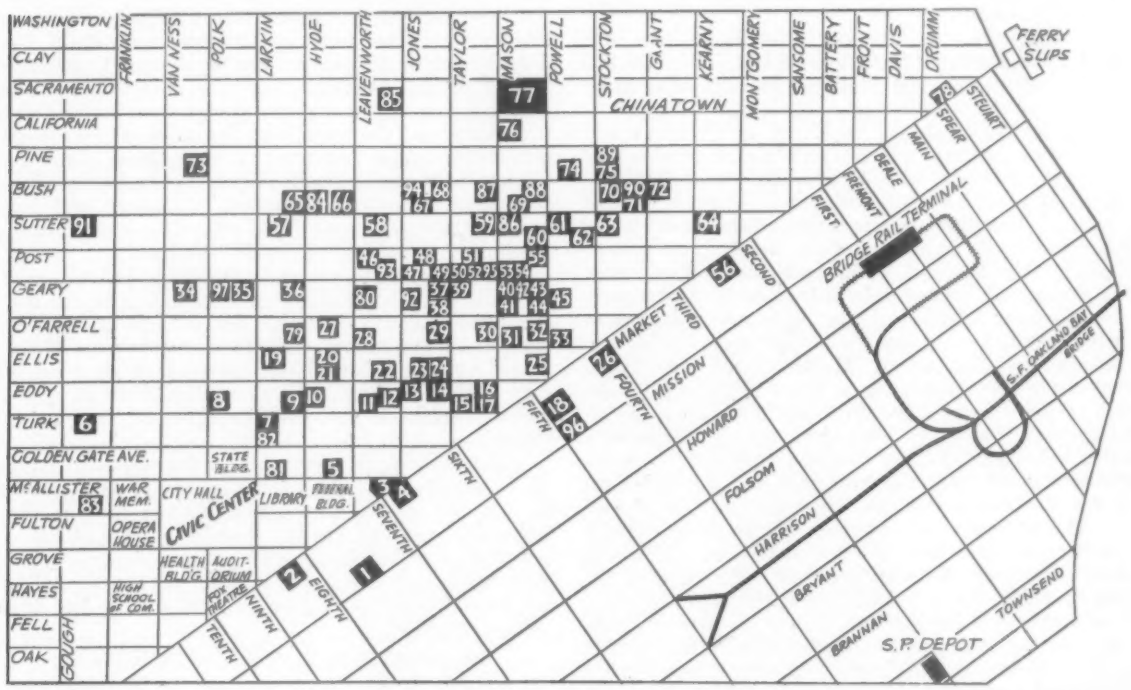
San Francisco is famous for loving life and for knowing how to play. It is famous for the friendliness and gayety of its people. There is something in the bracing salt air of the place that banishes gloom and fatigue.

San Francisco has more good restaurants per capita than any city except Paris and it is officially rated as having more first-class hotels than any American city except New York.

San Francisco shares with sunny Italy that phenomenon of climate—the Mediterranean type. Like Italy, the annual mean is approximately 56° F—with only 22° average variation from the coolest hour of a January night to the warmest hour of an average July or September day. The sun shines on 350 days a year for an average of eight hours a day. Oppressive heat and cold are alike unknown. Palms, olives, citrus, vineyards and semi-tropical flora grow in San Francisco and the earliest California oranges grow 160 miles north of San Francisco.

Temperatures vary as much as 15° in summer within the 40-mile radius of San Francisco—being cool in the city proper and as warm as 82° in the Redwood City suburb, 35 miles from the center of San Francisco.

The weather never gets in the way of a good time.



HOTELS

Alexander Hamilton	27	Colonial	74	Glen Royal	66	Maryland	50	Senate	7	Whitcomb	2
Ambassador	16	Commodore	58	Golden State	33	Maurice	48	Senator	20	Worth	48
Angelus	31	Court	70	Gotham	6	Mayflower	94	Shaw	3	Yuba	1
Arlington	29	Crane	43	Granada	65	New Olympic	23	Sir Francis Drake	21		
Baldwin	71	Davenport	92	Harvard	19	Ormond	17	Somerton	52		
Bellevue	37	Drake-Wiltshire	63	Herald	22	Oxford	12	Stewart	42		
Brayton	15	El Cortez	40	Herbert's	32	Padre	95	Stratford	45		
Broadmoor	91	Embassy	8	Keystone	26	Paisley	86	Sutter	84		
Californian	38	Empire	5	King George	40	Palace	96	Terminal	78		
Canterbury	87	Fairmont	77	Lafayette	10	Pickwick	82	Vanderbilt	30		
Carlton	57	Federal	4	Lankershim	18	Plaza	25	Victoria	75		
Cartwright	69	Fielding	53	La Salle	9	Powell	97	Virginia	41		
Cecil	91	Franciscan	54	Leland	73	President	24	Von Dorn	11		
Chancellor	60	Gartland	36	Lombard	34	Ritz	13	Washington	72		
Clark	14	Gaylord	47	Manx	44	Roosevelt	55	West'n Women's Club	99		
Clift	39	Geary	93	Mark Hopkins	78	St. Francis					
				Mark Twain	29	San Carlos					

MEETING PLACES

61	War Memorial—Veterans Building
45	War Memorial—Opera House
84	High School of Commerce
78	City Hall
30	Health Center Building
75	State Building
41	Exposition Auditorium
11	Fox Theatre
72	Library

APARTMENTS

Pearsonia Apts.	79	A	St. Francis Apartments 86
Louard Apartments	80	B	805 Bush Street 87
Plaza Apartments	81	C	Kenilworth Apartments 88
Congress Apartments	82	D	540 Stockton 89
316 Fulton Street	83	E	Court Apartments 90
Steinhart Apartments	84	F	
Georgian Court Apts.	85	G	
		H	
		I	

There is no rainfall from May to September, and in its rainiest month San Francisco has less rainfall than New York in June or July. Always there are moderate temperatures and invigoration in Pacific breezes.

San Francisco is air-conditioned by God Himself!

Everywhere are breath-taking panoramas of hills and mountains and salt water, with great ships coming and going through the Golden Gate to and from China, the Philippines, Hawaii, the South Seas and Latin America. And everywhere the air is as clean and fresh as if you yourself were on a ship at sea.

The largest Chinese colony outside of China—famed Chinatown—will be an easy walk from your hotel.

There are, of course, parks and museums, a fine zoo, superb art galleries—three of them publicly supported—a symphony orchestra, all the cultural things you'd expect in a city that has been the metropolis of the Pacific for more than eighty years. There are Stanford and the University of California. There is the background and feel of a civilization that has produced a university rated next to Harvard for the eminence of its faculty.

* *

Just now San Francisco has a special attraction. It has completed the two greatest bridges in the world, a statement that sounds like California superlative but that is just plain fact.

The San Francisco-Oakland Bay Bridge, eight miles long, piercing an island in mid-Bay as its great suspension spans swing across the fairway between the Golden Gate and the Pacific Fleet anchorage.

The Golden Gate Bridge—from the military reservation of the Presidio—Army headquarters for all the Pacific—to the cliffs of beautiful Marin county—a bridge that defies precedent with a span 4,200 feet long from tower to tower. And what towers! Each rises 746 feet from the waters, not of the Bay, but of the Pacific, where its tides race in and out the Gate.

The city is planning—and building—a great exposition to celebrate its new bridges and a new era of progress toward consolidating its position as metropolis of the Pacific, with Oakland and Berkeley and its other populous suburbs integrated into one great community of 1,500,000 population. The Golden Gate International Exposition, a Pageant of the Pacific, to be held in 1939, will be a real world's fair.

* *

San Francisco is easy to get to. It is the transportation center of the Pacific Coast by rail, highway, sea and air. Air-conditioned trains. The finest airplane service in the world. Watch the China Clippers take off for Manila and beyond. Get the thrill of the Pacific and of history about to be made. See the great naval base at Mare Island. Watch while great battleships and swift cruisers steam in and out of the Gate.

Altogether it's a stimulating and exciting place.

And San Francisco likes people. It makes them welcome, warms their hearts, stirs their blood. It gives them food, drink and shelter at more for their money than any place we know.

Come to the City by the Golden Gate! Go abroad at home! Enlarge your horizon by spending a few days or weeks here by the shores of the mighty Pacific.

See California. San Francisco is its heart.

ARRANGEMENTS FOR ANNUAL MEETING, SAN FRANCISCO, CALIF., July 10-14, 1939

Headquarters—Palace Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) 2 persons	Twin Beds for 2 persons	Parlor Suites
Palace	$4.00-$6.00	$6.00-$ 8.00	$7.00-$10.00	$15-$25
Bellevue	3.50	5.00	6.00	8- 10
Canterbury	3.50- 4.00	5.00- 6.00	7.00	10
Clift	5.00	7.00	8.00- 9.00	20
Drake-Wiltshire	3.50	5.50	7.00	
El Cortez	3.50- 4.50	4.50- 5.50	6.00- 7.00	10- 15
Empire	4.00- 5.00	6.00- 7.00	7.00- 8.00	10- 12
Fairmont	4.00- 8.00	6.00- 10.00	7.00- 12.00	20
Mark Hopkins	5.00- 7.00	7.00- 9.00	8.00- 12.00	20- 25
Maurice	3.50- 4.00	5.00- 6.00	7.00	12
Plaza	3.50	6.00	6.50	
St. Francis	4.50- 6.00	6.50- 8.00	7.00- 12.00	16- 30
Sir Francis Drake	5.00- 7.00	7.00- 9.00	8.00- 10.00	25- 30
Stewart	3.00- 4.00	4.50- 6.00	4.50- 6.00	7
Western Women's Club (for women only)	3.50		5.00	
Whitcomb	4.50	6.00- 8.00	7.00- 9.00	10- 12

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, ARRIVAL DATE AND DATE OF DEPARTURE, INCLUDING DEFINITE INFORMATION AS TO WHETHER SUCH ARRIVAL WILL BE IN THE MORNING OR EVENING.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the St. Francis Hotel, San Francisco, California, beginning Monday, July 3, 1939.

Applications for hotel reservations should be made to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

(For details as to information required by Reservation Department with respect to reserving hotel accommodations, please refer to the general announcement to all members of the Association also appearing in this issue of the JOURNAL.)

BINDER FOR JOURNAL

The JOURNAL is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to JOURNAL office, 1140 N. Dearborn St., Chicago, Ill.

THE BAR AND THE RECENT REFORM OF FEDERAL PROCEDURE

The Organized Bar, Having Shown That It Can Reform the Machinery of That Part of the Government Which It Directly Operates, Should Not Relinquish Its Leadership—It Should Demonstrate That Procedural Reform Is a Continuous Concern of the Profession—It Should Also Utilize Its Leadership in Dealing with Other Important Problems, Such as the Economic Condition of Lawyers and the Unsatisfied Need of the Middle-Class Many for Legal Services*

By Charles E. Clark
Dean of the Law School, Yale University

THE adoption of the new Federal Rules of Civil Procedure is an important milestone in bar association progress. Its effect on the administration of justice in our national courts is bound to be vast, perhaps revolutionary. But it is much more than a reform of court procedure. It is a coöperative movement of the lawyers of America to secure efficiency in their own household. Perhaps that ought not to be a strange event. Actually it is. Lawyers are individualistic and obstructionistic. A large part of their daily work is preventing someone from doing something. And they rarely work together for anything, and least of all to correct themselves. Stimulus for change must come from without the profession, as it did in England during the hundred years of struggle for procedural reform there. And now the miracle has happened. A lawyers' reform is actually here. Since September 16, our far-flung system of national courts has been operating pursuant to a streamlined procedure, first conceived by the American Bar Association twenty-six years ago and eventually made effective under Congressional authority by act of the Supreme Court upon report of its committee of fourteen lawyers, with the aid and coöperation of not only individual lawyers, but the organized bar associations of the country. This seems an occasion, therefore, not merely of self-congratulation, but for an examination of ways and means to make the methods here tried and tested available for yet wider use hereafter.

My own connection with the task of drafting the rules has been too close to enable me to judge all the results properly and with perspective. Yet the very intimacy of that connection has permitted me to see and appreciate the matter with which I am here immediately concerned, namely, the possibility of effective coöperation for public ends by members of the legal profession. My private opinion of the lawyers, I am bound to say, has gone up immeasurably, for I was not sure they would respond as they have done to this movement. In a current number of a popular magazine the famous author of "America's Sixty Families" takes the profession to task for leading business astray at high cost to the victim and complete safety to itself. Notwithstanding the obvious exaggeration of the picture there is much in it which cannot be easily answered and which should give us pause for thought. Yet the one element the author omits entirely—perhaps because the public has had no occasion to observe it at first hand—is the capacity for sustained and idealistic service of the bar disclosed when leadership has called it forth. The real need in the profession is to provide that leadership; the rank and file will support and follow it when it is provided. Now we have had a showing how bar associations may provide it. I hope the lesson will not be lost, and that the profession will not sink back into indifference, but will go on to other things, perhaps even more directly bound up with the lives of the ordinary layman and lawyer than is possibly the specialty of federal procedure.

While this is the main lesson of the new reform —one I wish to develop a bit before you tonight—there are other teachings to be had from the history of the movement. One is that in this country reform of governmental affairs is initially a democratic, that is, a political process. We cannot afford to give the legislators the feeling that they are being looked down upon. Here we find that for years and without success the distinguished leaders of the American Bar journeyed to Washington regularly to appear before the Senate committee and to denounce the opposition to the bill giving the Supreme Court power to make the rules. It was not until they gave up the fight through weariness and the Attorney General assumed command and exercised it with discriminating and masterly political skill that legislative authority for the reform was secured. The ninety days spent by him in accomplishing his objective, compared with the twenty-one years of unsuccessful effort of the Bar Association's committee, should tell us much as to effective ways of reform.

Again the work of drafting the legislation was not carefully done. The first section of what became the Enabling Act of 1934, authorizing rules in actions at law, was drafted by the committee in 1912; the second section, authorizing a united procedure in law and equity, was added after Chief Justice Taft had eloquently urged the more complete reform in 1922.[1] In several aspects the two sections conflict and those of us who have worked upon the rules have not always been in agreement as to the proper way of reconciling the two. (I have discussed this elsewhere, e. g., 49 Harv. L. Rev. 1303, and shall not stop to do so here.) Is there

*Address delivered at the Annual Dinner of the New York County Lawyers' Association, Dec. 1, 1938.

1. While Chief Justice Taft's address was delivered in 1922 (47 A. B. A. Rep. 250, 1922) the complete draft of the bill in its final form was not reported until 1924 when it was spoken of as Senator Albert B. Cummins' bill (49 A. B. A. Rep. 484, 485, 1924).

not a touch of irony in the fact that the leaders of the American Bar should for years have supported a bill so defective from the standpoint of technical workmanship? I fear it means that, while their hearts were enlisted in the cause of reform, their heads and hands were not.

When, however, we turn to the method of preparing the rules, it seems to me the Court adopted a course at once shrewd and sound. It placed the responsibility for doing the work, for doing a good job, on the profession itself. The result was that everyone accepted that responsibility and gave the best there was in him for the task. Not one failed to treat the matter as he would the most important or the most lucrative of professional engagements. Nay more than that—the lawyers all over the country, even those not officially charged with responsibility, gave voluntarily days and weeks and even months of attention to the careful scrutiny and criticism of the proposed drafts. No such outpouring of professional talent has ever occurred before. It shows the possibilities for high service, now left latent in the profession.

Again the method chosen was one designed to bring the lawyers as nearly in accord as possible. The particularistic nature of the differing procedures varying from state to state has been well known. It is one of the chief barriers to effective law administration in this country, as it was one of the reasons for the dismal failure of the old federal practice with its attempted conformity to the various local rules. When this work was commenced, lawyers everywhere fully believed and strenuously argued that their own state practice, and that alone, should be adopted for the entire country. It was gratifying to see, however, how our committee grew together. I well remember the divergencies of views disclosed at our first meeting to consider a draft of rules. I was worried, for the task of procuring reconciliation of all these opposing viewpoints seemed almost hopeless. But the process became one of education for us all. We learned that other ideas than our own were being employed by our near neighbors without disaster and often with profit. Here was shown the shrewd advantage of having a wide spread of experience and background in our committee. With rather amazing rapidity our views came together in either complete accord or reasonable compromise. The aid to this end afforded by the informed comment of the bar on the drafts was immeasurable. That served to disclose not merely holes in particular rules—defects of draftsmanship which thus could be corrected in time—but also how new procedural devices could be adjusted to existing and not dissimilar devices (devices certainly not different in purpose at least) already widely and favorably known in state practice. In effect it showed the bar ready for reform, and for reform of an extensive nature.

I am confident that the result is the best possible under the conditions of time and divergent background which produced it. It is a great advance over anything we have had before. Where compromise with differing views was necessary, that compromise was reasonable. The basic principles are sound. But I do not say it is the best practice possible. In fact I see a danger already that the rules are to be apotheosized. I am finding considerable feeling that we must not raise any questions about any of the rules for fear that this will open the gates for general attack. Judges are ruling that the words of the rules, construed as fiats, must be given literal interpretation without respect to the purpose in mind, that the rules are an end in themselves and not, as they should be, merely a means to an end, and that end the doing of substantial justice as the rules themselves state. When objection is made to a pleading, the issue should not be whether there is a technical violation of a rule, but whether correction will advance the cause materially.

The difficulties and dangers of this legalistic approach to the rules are shown by a development, which might be amusing if it were not serious. I refer to the practice as to motions for bills of particulars which I am told is already developing in the district courts here. Under the new rules (R. 12, e) the practice of securing a bill of particulars, a weapon exquisitely designed to delay a cause and to make the pleadings technical, detailed, and therefore useless, and for little else, is narrowly limited. A bill is obtainable only as to defects definitely pointed out or details which are needed to enable the moving party properly to prepare his responsive pleading or for trial. I think events already indicate that the limitation has not been made explicit enough, indeed that these bills ought to be abolished altogether, leaving the objection to a pleading to be framed on no lesser ground than failure to state any claim or defense.

Now the difficulty here came because of the New York fondness for these infernal and complicating procedural weapons. Down here when in doubt as to your case you move for a bill of particulars, and when not in doubt you move anyway. Your able Judicial Council diagnosed the evil of too many such bills delaying the cases; but its remedy—semi-automatic granting of the order[2]—seems to me almost worse than the disease. It is sure to make your pleading narrow and particularistic, although that is what we have been trying to get away from since the days of common law pleading. Such pleadings take valuable time of courts and litigants to obtain and to perfect and when secured they are of no value; for the clients in any court of justice cannot be held bound by these unreal asseverations of the lawyers. The necessary process of free amendment to do justice makes all this polishing up of the paper pleadings futile, indeed worse than futile, because of the waste of time and effort involved.

The trouble is that you have confused the pleadings with the evidence. Pleadings cannot supply the place of proof to try your case. Their function is only to set the general boundaries of the action and to provide the basis for res adjudicata or the binding force of the final judgment to be rendered. If you need facts about the case before trial from your opponent, you should get them by deposition and discovery. Here I think is the explanation. New York lawyers have been reluctant to accept modern principles of discovery, for fear that it would permit of the manufacturing of evidence. On the contrary it is one of the greatest engines for securing the truth *at once* from a witness or a party and thereafter holding him to it. Not only is it much easier to secure and more convenient than a bill of particulars, but it is much more effective. It is the direct testimony of those who know as to what they know; it is not formal assertions of what you hope to wring out of the other side—assertions to be repudiated if and when found to hamper one's case. It is the reality of trial in place of the formality of allegation. My own conclusion is that, thwarted in your needs for a complete discovery practice, you have been unfortunately turned to a system of repolishing the pleadings in your State practice.

At any rate I am told that a flood of motions for

2. Second Report, Judicial Council of the State of New York (1936) pp. 143, 159; N. Y. Laws 1936, ch. 241; Rules of Civil Practice 115, 116, and 117.

such bills has descended on the federal courts. It would seem that under the rules all should be denied except those occasional ones where the mover can show he is in need of specific information which his opponent has and he has not. And yet I understand there is a disposition to grant the motion freely. One distinguished judge, replying to the plaintiff's claim that she did not have the information desired, told her she could obtain it by deposition from the defendant, the very person whose instruction is the sole reason for granting the bill. Another, so I am told, responded to an argument that such a motion be denied with the suggestion that practice under the rules was designed to be flexible and non-technical—thus employing the very liberality of the rules to resurrect the old technicalities of formal pleading. It was hoped that the new federal reform would lead the states forward to greater simplicity and directness in law administration. It would be unfortunate if instead the freedom of the rules should be employed to import into the federal system the restrictions of state practice.

I think this all serves to show the importance of a standing committee on procedural rules as recommended by the American Bar Association. Difficulties which are now developing in the rules can be corrected and the practice kept in the channels envisaged by the purpose of the new reform. It is the essence of procedure, being only means or methods, red tape if you will, to require change and correction. It hardens and crystallizes. It must be continually brought up to date. The tools of justice need constant resharpening. It is to be hoped that the Court will appoint a standing committee, and that soon and before the practice becomes too solidified.

My final thought is twofold. The organized bar, having shown that it can reform the machinery of that part of the government which it directly operates—the courts—should not relinquish its leadership. It has shown it can act effectively here. It should now demonstrate that procedural reform is not just one grand coup, but is a continuous concern of the bar. The long and steady pull, not the one spurt, is finally going to determine the fitness of the bar for responsibility in this field. And again the efforts of the organized bar cannot be limited to this task, important as it is. Your own organization, in path-breaking investigation, has shown, I believe, the direction which the next steps of public concern by the profession should take. I refer to the epoch-making report of your committee, and your Association, on the economic situation of the bar here in New York. That and other original research of the present time disclose two startling and inconsistent facts. The first is that much of the bar is in need. The second is that much of the requirements of the middle class of our community for legal service are not in any way met. It is a reproach to the bar that this paradoxical condition can exist, and it is to the credit of this Association that you have taken steps to disclose the condition. I am glad, indeed, to see that discussion of the report and further investigations of conditions is indicated.

Obviously, however, you must go beyond mere study of the problem. You must provide remedies or else your leadership is again a matter of reproach. On this occasion I have not the time, nor is it appropriate in the light of my general subject, to attempt to discuss ways and means of meeting the needs thus disclosed. I do have the feeling that, unless the bar takes the full responsibility for the situation and does more than merely suggest and urge that individuals provide remedies, no steps of improvement will occur. It is for the bar to act through group action, and itself to provide a staff of competent attorneys and to see that that staff affords legal service for the people who are not in a position to know or to seek out the leaders of the profession to care for their needs.

Here is a virgin field, ripe for the attention of the bar. With its taste for accomplishment thus, I trust, whetted by its recent successes, I hope it will be inspired to go forward and help to solve one of the most pressing social projects of the day—the maladjustment of legal service to community needs.

(Second Notice)

SPECIAL COMMITTEE ON SURVEY OF SECTIONS AND COMMITTEES OF THE ASSOCIATION

REQUEST TO ALL MEMBERS OF THE AMERICAN BAR ASSOCIATION WITH REFERENCE TO THE FORMATION OF CERTAIN ADDITIONAL SECTIONS.

The House of Delegates and the Board of Governors at the 1938 annual meeting directed this committee to "take steps to ascertain the extent and the character of the desire among the members of the Association for the establishment of sections on administrative law, banking law (or banking and trust law), and tax law."

Pursuant to that instruction, this committee now requests the views of all members of the American Bar Association on any or all of the proposals for the establishment of such new sections. Will you please bear in mind that those whose temperament leads them to feel the desirability of the establishment of new activities, are always more vocal than those who oppose. If, therefore, you feel that action should not be taken, please say so. The committee takes no position whatever as to the desirability of establishment or non-establishment of new sections. It is, however, aware of the normal tendencies of the members of the Association.

The Committee trusts that it will be demonstrated by this notice that the AMERICAN BAR ASSOCIATION JOURNAL is widely read by the members and that notice to you made in this way can be as effective as if a letter were written. Quite clearly, this method is less expensive.

Please send your replies to the chairman of the committee, mailing when convenient a copy to each of the other members of the committee.

ALBERT SMITH FAUGHT, Finance Building, Philadelphia, Pennsylvania.

JACOB M. LASHLY, Central National Bank Building, St. Louis, Missouri.

CLARENCE E. MARTIN, People's Trust Building, Martinsburg, West Virginia.

JAMES OLIVER MURDOCK, 1001 15th Street, N. W., Washington, D. C.

F. H. STINCHFIELD, Chairman, First National-Soo Line Building, Minneapolis, Minnesota.

FEDERAL ADMINISTRATIVE AGENCIES: HOW TO LOCATE THEIR RULES OF PRACTICE AND THEIR RULINGS WITH SPECIAL REFERENCE TO THEIR RULES OF EVIDENCE

A Compilation of Practical Information That Should Be of Assistance to Lawyers Called on to Advise the Citizen Whose Personal Interests May Be Affected by the Actions of Forty or Fifty Administrative Bodies Now Functioning in the Nation's Capital—List of Principal Ones That Hold Hearings, Adopt Regulations of Procedure and Render Decisions Touching Private Interests—Their Functions, etc.

By John H. Wigmore
Dean Emeritus of the Law School of Northwestern University

IN Washington there are today between forty and and fifty administrative bureaus, boards, and commissions whose rules and rulings may affect directly the personal interests of the individual citizen. They may thus impel him to obtain the assistance of a member of the Bar to represent him at a hearing. Lawyers therefore need to know where to find the rules and regulations of those agencies governing the procedure in practising before them, and the rulings that are on record in like classes of cases.

I wanted that information particularly to enable me to learn how far those agencies relied upon the jury-trial rules of Evidence in that practice. But I found that this subject was bound up with their general rules of procedure, if any, and with the rulings made under that procedure. So the information here offered would have a general utility over and above my particular quest.

But I could discover no single available official source of that information. Inquiry of two eminent practitioners who are keenly interested in administrative law, as practised in Washington, produced no clue. One of them kindly replied, "Every practitioner before the administrative tribunals would welcome an article of the type that you have in mind. I know there are occasions when, if I had it available, it would save me a tremendous amount of digging, or, what is worse, a lot of worry and uncertainty."

Meanwhile I had engaged in correspondence with the Washington agencies—with some forty in all. The replies—usually prompt and accommodating—brought such a copious supply of novel information that I believed it worth while to offer it immediately to the profession in concise though (I daresay) dry form. This account does not profess to be complete; but it is the only collection of such information that I know of, and is authentic and up to date, and therefore ought to be useful to many.

But, though incomplete, its publication here will undoubtedly lead to correspondence from those who can correct or enlarge it. And I earnestly ask for such comments that may give the kind of information here offered.[a]

The principal Federal administrative offices that hold hearings, adopt regulations of procedure, and make

a. Note the following related but distinct matters:
(1) Many statutes make the administrative ruling conclusive on the facts, *"if supported by substantial evidence."* This matter of the *sufficiency* of the evidence is the same that arises in jury-trials, and is not considered here.

(2) *General information* about the organization and the work of these Federal agencies is officially supplied in the following: United States Government Manual; published by the National Emergency Council, as a part of the United States Information Service (Commercial National Bank Building, 14th & G. St. N.W., Washington; issued in loose-leaf pages with expansible binder).

(3) Most of the administrative tribunals of broad and active jurisdiction maintain formal *rolls of qualified persons admitted* to practice before them. All the data on this subject, and much related useful information, are collected in the following pamphlet: Admission to and Control over Practice before Federal Administrative Agencies (Report to the Bar Association of the District of Columbia of the Committee on Administrative Practice, Louis G. Caldwell, chairman, Nov. 1, 1938. Law Reporter Printing Co., 518 Fifth St. N.W., Washington; price, one dollar).

(4) All of the new executive and administrative regulations must be published in the *Federal Register*, and can be found somewhere therein. But not many practitioners keep a file of the Register; moreover, there cannot be any prompt indexing of it; and, because of the varied matter of topics and amendments, the search for a complete set of rules of any one agency may be arduous. Hence, the convenience of obtaining from each agency its own edition of the regulations.

(5) The following private publications contain or summarize many of these regulations and rulings:

The *United States Law Week* (sub-title, "A National Survey of Current Law"; Bureau of National Affairs Co., Washington; vol. 6 began in Sept. 1938) includes in its news administrative interpretations, decisions, and orders of Federal government agencies, as well as rulings and regulations of departments, boards, and commissions. It supplies abstracts (sometimes the text) of administrative regulations, and abstracts of rulings and decisions, often from the official record before printed publication; and it aims to cover all administrative agencies.

The *Commerce Clearing House Co.* has several specific services, mentioned at the appropriate places in the following notes.

(6) A valuable treatise (mimeographed) is *Mohundro's Notes on Pleading, Practice, and Procedure before Federal Regulatory Commissions* (pp. 942; Guthrie Lithograph Co., 1150 First St. N.W., Washington, 1938), based on notes for lectures to a class in the National University Law School. The text of the rules of the various agencies is not given. Inasmuch as the newer agencies have few precedents, the author's treatment as based on recorded precedents of practice is limited mainly to practice before the Interstate Commerce Commission, and therefore cannot always serve in practice before other Federal agencies.

rulings or decisions affecting the interest of the individual citizen deal with the following subjects:

1. Agriculture
2. Aviation
3. Banking and Public Finance
4. Civil Pensions
5. Civil Service
6. Coal
7. Communications
8. Customs Revenue
9. General Accounting
10. Housing
11. Immigration
12. Indian Affairs
13. Industrial Accidents
14. Internal Revenue
15. Labor Relations
16. Patents
17. Petroleum
18. Postal Service
19. Power
20. Public Health
21. Public Lands
22. Reconstruction Loans
23. Securities
24. Shipping
25. Trade
26. Transportation
27. War-Veterans
28. War-time Boards

Agriculture. Several agencies here share the field of administrative authority, all of them under or allied with the Department of Agriculture.

(*a*) The *Bureau of Agricultural Economics* performs regulatory work in connection with the enforcement of the Cotton Standards Act, the Cotton Futures Act, the Grain Standards Act, the Standard Containers Act, the Standard Hamper Act, the Produce Agency Act, the Perishable Agricultural Commodities Act, the Warehouse Act, etc.

Its regulations of procedure are published in separate pamphlets applicable to the respective Acts above mentioned, and contain elemental rules for hearings, appeals, production of books and papers, etc., dealing chiefly with the suspension, cancellation, and revocation of inspectors' licenses and grade certificates.[1]

(*b*) The *Bureau of Animal Industry* administers the Meat Inspection Act, the Animal Quarantine Act, the Twenty-Eight Hour Law, the Diseased Animal Transportation Act, the Virus-Serum-Toxin Act, etc.

Its regulations of procedure are published in separate pamphlets (sometimes mimeographed) applicable to the respective Acts.[2] They contain some simple well formulated rules for hearings, notice, burden of proof, etc. For some of the Acts, the rules are in identical standardized form; in two of them thus: "Hearsay evidence may in the discretion of the examiner be admitted, even though it does not come within any well-recognized exception to the Hearsay rule, but the Secretary will determine what weight shall be given to such evidence." For another Act, a rule appears, "At any such hearing, the presiding officer need not apply the technical rules of evidence."

Rulings and decisions made as the result of hearings are published in a periodical entitled Service and Regulatory Announcements of the Bureau of Animal Industry.[3]

(*c*) The *Bureau of Entomology and Plant Quarantine* enforces quarantines and restrictive orders issued under the various plant quarantine laws, to prevent the importation of plant pests and to regulate the interstate movement of plants, fruits, etc., likely to carry dangerous pests.

No regulations of procedure have ever been issued; and complaints if any are taken up informally with the Chief of the Bureau.[4]

(*d*) *The Commodity Exchange Administration* (formerly the Grain Futures Administration) acts under the Commodity Exchange Act (June 15, 1936, Pub. No. 675, 74th Cong.) to supervise all trading in futures of grain, cotton, rice, etc., on commodity exchanges.

Its regulations are promulgated under the joint authority of the Secretaries of Agriculture and of Commerce and the Attorney-General, acting as the Commodity Exchange Commission.[5] They contain some well-stated simple rules about depositions, affidavits, copies, etc., which might well be adopted by other agencies. They also provide that the referee "may in accordance with the rules of evidence applicable to administrative proceedings [? ? ?] admit or exclude any evidence presented, and may limit the scope of any evidence admitted."

The rulings of the Secretary of Agriculture (under whose authority the hearings take place) in proceedings under the Commodity Exchange Act are issued in mimeographed form as such decisions are announced from time to time. They have never been issued in bound form, and such as are of general applicability and legal affect are available in published form only in the Federal Register.

2. *Aviation.* The federal statutes regulating civil aeronautics (under the powers over interstate and foreign commerce and national defense) deal only with regulatory (administrative) measures, and not (as yet) with civil liability. This regulatory function is centered in the independent *Civil Aeronautics Authority* (successor to Bureau of Air Commerce, in the Department of Commerce); its main tasks include the issuance, denial, suspension, and revocation of certificates pilot competence, of aircraft airworthiness, and of airline carrier licenses; the award of airmail contracts, and the investigation of aircraft accidents.[6] The organic Act (§ 1004) contains a few standard provisions about subpoenas and depositions, but has nothing to say about other rules of evidence.[7] The Civil Air Regulations, issued by the Authority, lay down a careful and elaborate system of

1. Regulations of the Secretary of Agriculture under the D. S. Grain Standards Act (effective July 1, 1935). Regulations of the Secretary of Agriculture under the U. S. Cotton Standards Act (effective Aug. 20, 1936). Similar pamphlets for the Cotton Futures Act, etc. etc.

2. Rules of Practice to cover hearings on Revocation of Licenses under the Viruses, Serums, Toxins Act (mimeograph of July 9, 1938). Rules of Practice to govern proceedings under the Packers and Stockyards Act 1921 (edition of March 1, 1938, Appendix 2; another Bureau now handles this). Regulations governing Notice and Opportunity for Hearing upon Marketing Agreements, etc. (Aug. 30, 1935, Series A); and similar ones entitled Series D, Series E, Series F.

3. Service and Regulatory Announcements, Bureau of Animal Industry (monthly; e.g. Sept. 1938 contains the rulings in Docket Nos. 891, 949, 976, 981, 1041, 1059, 1090, 1121, 1141, giving the parties' names).

4. A considerable number of quarantines, with supplementary regulations, have been issued under the authority of the Plant Quarantine Act of August 20, 1912. These quarantines are published separately and, together with certain rulings relating thereto in the form of B. E. P. Q. circular letters, are republished in the Service and Regulatory Announcements, printed quarterly.

A List of Current Quarantine and Other Restrictive Orders and Miscellaneous Regulations, dated March, 1938, will be sent on request.

5. Rules of Practice to Govern Proceedings under the Commodity Exchange Act (mimeograph; Nov. 18, 1936).

The Department also publishes: Regulations governing the Production of Evidence and Appearances in Administrative Proceedings (dated Oct. 24, 1935; covering subpoenas, depositions, documentary evidence, fees and mileage, and appearances; but perhaps these are applicable only to proceedings under the hog-cholera Acts).

6. The history of the regulatory statutes will be found in the following articles: Fred D. Fagg, Jr., "National Transportation Policy and Aviation" (J. Air Law, 1936, VII, 155): Clinton M. Hester, "The Civil Aeronautics Act of 1938" (J. Air Law, 1938, IX, 451) and the history of the Civil Air Regulations is given in the same Journal for Jan. 1938, in a symposium article by five authors.

7. St. 1938, Civil Aeronautics Act, June 23, 75th Cong. 3d sess. Pub. No. 706.

procedure.[8] The Inspectors' Manuals for the conduct of investigations and hearings contain a few additional rules but do not adopt the jury-trial rules.

3. *Banking and Public Finance.* Two agencies of wide influence may be classed under this head:

(*a*) The *Federal Reserve Administration* was established under the Act of Dec. 23, 1913, which aims to supervise banking operations. It acts in determining discount rates, controlling credit expansion, regulating open-market transactions, etc., by Federal reserve banks and State member banks. Although from time to time interested persons confer with the Board of Governors of the Federal Reserve System, or members thereof, concerning matters which fall within the Board's jurisdiction, the occasion for holding formal hearings arises very infrequently. Accordingly, the Board has found it unnecessary to adopt any rules or regulations governing hearings.

The administrative rulings of the Board of Governors of the Federal Reserve System which are deemed to be of public interest are published in the Federal Reserve Bulletin.[9]

(*b*) The *Federal Deposit Insurance Corporation* was organized under the Banking Act of June 16, 1933, to provide for the insurance of bank-deposits against loss in banks desiring that protection. It thus has certain regulatory powers over mergers, capital, dividends, advertising, etc., of member banks.

The Board of Directors of this Corporation has not formally adopted any regulations relative to hearings provided for or authorized by Section 12B of the Federal Reserve Act, as amended, pursuant to which this Corporation was established. The necessity has not been found to exist for the formulation or adoption of regulations of procedure. All due regard is had for the giving of notice of hearings, for granting full opportunity for the presentation of the case of the party or parties interested and for the conduct of hearings in accordance with appropriate legal procedure.

Rulings and decisions on claims, etc., have not been published, but may be found as part of the records of the Corporation.

The general rules and regulations of the Corporation (comparatively few) have been sent promptly upon their issuance to all insured banks and to the interested parties. They are incorporated in the printed annual reports of the Corporation, and may be found also in the Federal Register. These are comparatively few, and have been purposely limited within what are considered requisite and normal bounds.

4. *Civil Pensions.* Two Federal agencies here operate in independent fields.

(*a*) *Old Age Benefits and Unemployment Insurance.* The Social Security Oct (St. 1935, Aug. 14, c. 531, U. S. Code Tit. 42, c. 7) makes grants in aid to States for old-age assistance (Tit. I), for unemployment compensation (Tit. III), for aid to dependent children and child welfare (Tit. IV and V), for aid to public health (Tit. VI), and for aid to the blind (Tit. X). By Title II, Federal old-age benefits are provided, for direct payment to the individual. The administration of the Act is given (Tit. VII) to the *Social Security Board,* and this Board is authorized (Sect. 1302) to make regulations for the discharge of its functions.

Under Title II, it has made regulations for the disbursement of old-age benefits;[10] these regulations contain only a few simple rules for the mode of proving the principal material facts, viz.: age, death, relationship, and employment. Art. 307 of the Rules optimistically provides that when the total amount of a lump sum payment is "$100 or less," the statement contained in the application as to the wage-earner's date of birth [i. e. showing him to be 65 years of age or more] will ordinarily be sufficient, though corroborative evidence may in certain instances be required.

(*b*) The *Railroad Retirement Board,* as an independent agency created by the Act of Aug. 29, 1935 (Pub. No. 399, 74th Cong.), administers a "retirement system" of annuities for employees of all carriers subject to the Interstate Commerce Act. It passes upon all applications for benefits, calculated according to the provisions of the Act.

Its regulations of procedure provide simple rules for hearings, subpoenas, findings, and appeals, following the statutory provisions.[11] Its rulings are not published.

5. *Civil Service.* The *United States Civil Service Commission* was created by the Act of Jan. 16, 1883, to organize a merit system for the appointment, promotion, retirement, and dismissal of Federal civil employes. It issues certificates for appointment, maintains records of service, rates efficiency, investigates fraud, irregularities, etc., operating under the original Act of 1883, the Retirement Acts of 1920, 1926, and 1930, and the Classification Act of 1923 (all as amended). Its Board of Appeals and Review passes upon appeals from action taken in rating, transfer, promotion, retirement, etc.

Its regulations of procedure are formulated in several distinct sets, appropriate to the respective powers involved.[12]

8. Civil Air Regulations (loose leaf) 1938; Part 91, "Aircraft Accident Investigations"; Part 92, "Hearings upon Certificates"; Part 93, "Evidence"; Part 94, "Penalties"; Part 95, "Imposition, Remission, and Mitigation of Penalties."

The Commerce Clearing House Co. furnishes an Aviation Law Service (one volume, continuing); reporting all court decisions, attorney generals, opinions and departmental rulings pertaining to the subject of Aviation, involving insurance, liability, negligence, regulation, airports, taxation, etc.; also covers Federal Laws and Regulations and State Laws.

9. The Board has also published a digest of its rulings which have appeared in the Federal Reserve Bulletin from 1914 to October 1, 1937. This digest may be obtained from the office of the Secretary of the Board of Governors ($1.25). However, most of the rulings mentioned above are interpretations of the Federal Reserve Act and related statutes and regulations of the Board and strictly speaking are not rulings and decisions on claims.

10. Social Security Board, Regulations No. 1, June 15, 1937, and Regulations No. 2, July 20, 1937.

The rulings are issued in copious mimeograph Press Releases.

The Commerce Clearing House Co. furnishes an unemployment insurance service, reporting on the Federal Social Security Act, including Federal Old-Age Benefits and State Unemployment Insurance Laws; the laws reported in full text, with all rulings, regulations, instructions and forms thereunder.

11. Published only in the Federal Register, vol. III, No. 122, June 23, 1938 (Parts 50 to 60, numbered decimally, deal with procedure).

12. Civil Service Act and Rules, Statutes, Executive Orders and Regulations, with Notes and Legal Decisions (to June 30, 1937); this contains (pp. 12-63) the Executive Order of Apr. 15, 1903, revised to June 30, 1937, entitled "Civil Service Rules," which prescribe the procedure as to appointment, examination, promotion, removal; it also includes the text of various statutes providing for hearing, notice, etc.

The Civil Service Retirement Act, including abstracts of decisions, etc. (1934).

Regulations and Rules of Procedure governing the Administration of the Retirement Laws (1938), these contain a few simple requirements for medical examination, documentary evidence, etc., and a special group of rules (Rule 13) for taking appeals from the Retirement Division to the Board of Appeals and Review.

Another short set of rules (mimeograph, 1932) provides a procedure for appeals to the same Board from rulings by the Division of Personal Classification as to classification and allocation of positions; here the Board "shall be the judge of the competency and sufficiency of evidence offered."

Its rulings are published only as footnotes to the printed regulations.

6. *Coal.* By the statute of Aug. 30, 1935, were created the National Bituminous Coal Commission and the Bituminous Coal Labor Board. The former, assigned to the Department of the Interior, administers the provisions regulating the marketing of coal under the Coal Code; the latter, assigned to the Department of Labor, but now defunct, was to administer the provisions regulating collective bargaining between employes and employers.

The Commission holds hearings and makes rulings, and its findings of fact (§§ 4, 5 and 6) "if supported by any substantial evidence shall be conclusive" ("by substantial evidence" in some passages).

The regulations provide a few standard rules of procedure, including depositions, subpoenas, and documents; and the Commission maintains a register of persons entitled to represent parties and to practice before it.[13]

7. *Communications.* The Communications Commission (successor to the Radio Commission) administers the Federal statutes governing communications by telegraph, telephone, and radio.[14] This involves the issuance, denial, suspension, and revocation of licenses, and the disposition of complaints about interferences, etc. An elaborate system of procedure is employed, and a register is maintained of persons qualified to practice before the Commission. The rules (par. 106.8) adopt "the rules of evidence governing civil proceedings in the Courts of the United States" for formal hearings; except that the right is reserved "to relax such rules in any case where in its judgment the ends of justice will be better served by so doing."[15]

8. *Customs.* In the administration of the tariff laws for imported goods and the collection of customs dues, three separate agencies are concerned.

(*a*) *Bureau of Customs.* The Bureau of Customs directly inspects imported articles, appraises them, and imposes and collects the dues, subject to appeal by the importer. The former Board of General Appraisers within the Treasury Department, now entitled the *United States Court of Customs,* and the *Court of Customs Appeals,* which is independent of the Treasury, possess in their fields a finality of decision on matters of fact. The Supreme Court seems not to have imposed the jury-trial rules of evidence on these courts,[16] nor do they strictly enforce those rules, either in office practice or on appeal.[17]

The Court of Customs Appeals, reorganized in 1930 with enlarged jurisdiction, is entitled United States Court of Customs and Patent Appeals.[18]

(*b*) The *Foreign Trade Zones Board* was created by the Act of June 18, 1934, to enable foreign merchandise to be imported without payment of customs dues, subject to later exportation after storage, grading, or other manipulation. For this purpose zones are established in all ports of entry, where desired. The Board supervising the administration of this privilege is composed of the Secretaries of Commerce, War, and Treasury, with an Interdepartmental Committee of Alternates acting under the Board, and an Executive Secretary in the Department of Commerce.

Its regulations[19] covering procedure and practice are numbered decimally and serially (to fit into the code of Federal Regulations), and contain (§§ 1300) one of best formulated sets of rules for the conduct of hearings and presentation of evidence.

Its orders (of general applicability) are published in the Federal Register only.

(*c*) The *United States Tariff Commission,* originally created in 1916, operates now mainly under the Tariff Act of June 17, 1930, and the Trade Agreement Act of June 12, 1934. Besides its informational and research duties, it investigates several subjects with a view to making recommendations for action by the President under the above Acts—cost of foreign production leading to change in tariff rates; unfair methods of competition, leading to exclusion of articles from entry; foreign discriminatory charges, laws, etc.

Its regulations of practice and procedure[20] concern chiefly applications and complaints under the Tariff Act, § 336 (equalization of costs of production) and § 337 (unfair practices in import trade), and contain only a few fundamental provisions about subpoenas, depositions, etc.

9. *General Accounting Office.* The auditing of the Governments disbursements, performed by the General Accounting Office, at the head of which is the Comptroller General, involves a great variety of legal questions, mainly the interpretation of statutory law,

13. Rules of Practice and Procedure before the [National Bituminous Coal] Commission; June 6, 1938 (mimeograph). Certain regulations are also published in newspapers of general circulation in coal-producing areas.

The rulings are published in the same manner.

14. The earlier history of this Commission is given in the following: L. F. Schmeckebier, "The Federal Radio Commission" (1932; Service Monograph No. 65, Brookings Institute for Government Research, Washington).

15. Federal Communications Commission, Rules and Regulations, Part I, Practice and Procedure (ed. 1936); this covers Rules 100-107. Rule 106, Hearings, has a few rules about documents, subpoenas, and depositions.

The rulings of the Commission are reported in Federal Communications Commission Reports (vol. I, 1934; vol. V, 1938). The judicial decisions on appeal are found in the Federal Reporter. The following ruling is an example of the improper judicial insistence upon jury-trial rules: 1938, Tri-State Broadcasting Co. *v.* Federal Communications Commission, D.C.-App., 96 Fed. 2 e 564 (findings rejected, because some hearsay evidence was used).

16. 1890, Auffmordt *v.* Hedden, 137 U. S. 310; 1893, Passavant *v.* U. S., 148 U. S. 214.

17. The rulings of both Courts are to be found in the following series: Treasury Decisions under Customs and Other Laws, 1899+ (vols. 72, 73 in 1938). The decisions of the Court of Appeals are reported also in the Federal Reporter and in the separate series Customs and Patent Appeals, cited *infra,* in par. 16.

See also an article by Judge George Stewart Brown, "The United States Customs Court" (J. of American Bar Ass'n, June and July, 1933, vol. xix).

For proceedings as to the suspension or revocation of licenses of *customhouse brokers,* see par. 14, in the text *infra.*

18. See the citations to par. 16, *infra.*

The Customs Regulations themselves (ed. 1937) are published in a separate volume obtainable only (for $2) from the Superintendent of Public Documents. The amendments to the Regulations are published in the weekly series of Treasury Decisions, cited *supra.*

The history and scope of this branch of the Treasury is given in the following: L. F. Schmeckebier, The Customs Service (Service Monograph No. 33, Brookings Institute for Government Research, Washington, 1924).

19. Regulations governing the establishment, operation, maintenance, and administration in the United States of Foreign-Trade Zones, with rules of procedure and practice in formal and informal proceedings, and text of the Act (Reprint of January, 1938).

20. Rules of Practice and Procedure in administration of Sections 332, 336, 337, and 338, Title III, Part II, Tariff Act of 1930; Sixth Revision, December 1937. These rules are to be codified as Title 19, chapter 2, of the Federal Administrative Code.

The hearings are reported stenographically; but the records and decisions are not published for general circulation; they may be consulted at the office or by copy purchased from the reporter.—Reports of investigations are printed in pamphlet form when deemed desirable.

but appears not to have developed any peculiarities in rules of procedure and proof.[21]

10. *Housing.* By the Act of June 27, 1934 (Pub. No. 479, 73d Cong., National Housing Act) a Federal Housing Administration was created with a wide scope of duty in various methods of improving, rehabilitating, and cheapening the construction of housing accommodations. But other agencies were also concerned in certain related and more specific duties and powers. So the *Central Housing Committee* at Washington, coördinates the administration of a number of Federal laws involving housing activities,—Home Owners Loan Corporation, Farm Credit Administration, Home Loan Bank Board, Federal Savings and Loan Associations, etc. Its regulations and rulings cover a great variety of legal topics—bankruptcy, insurance, titles, foreclosures, eminent domain, etc. The Committee was established by Executive Order of August, 1935, to serve as a clearing house for information and as a medium for executive coöperation between the eight Federal agencies most concerned with housing finance and construction. One of its main sub-committees is the Sub-Committee on Law and Legislation, composed of the general counsel of the eight coöperating agencies, and this Sub-Committee serves as an informational source.[22]

11. *Immigration.* The Immigration Bureau (Department of Labor) has been a storm-center for the question of finality of decision by administrative officials. What sets it apart as anomalous in this aspect is that it deals mainly with aliens, whose rights to invoke judicial remedies may stand on a different footing from those of citizens; so that a judicial license to be more independent than other administrative officials might be expected. However, its exercise of jurisdiction also affects citizens—by birth and constitutional right—who seek entrance to the country, and thus its subjection to judicial review is in this aspect no different from other officials. Strictly distinguishing the questions of finality of ruling and of due process, and looking only at the question of enforcement of jury-trial rules of Evidence, we may deduce from the Federal Court's utterances that those rules, as a body, are not expected to be binding on the Immigration Bureau.[23]

12. *Indian Affairs.* The administration of the numerous statutes regulating the government, the property, and the contracts of Indians, both tribal and individual, is placed in the hands of the Office (formerly Bureau) of Indian Affairs, under a Commissioner in the Department of the Interior.[24] This office supervises a great variety of legal transactions—allotments of lands, making of leases, probate of wills, distribution of estates, custody of funds, permits to traders, etc. The only hearings, as such, in which this Office is primarily interested are those held for the purpose of determining the heirs of deceased Indians. The hearings, or conferences, held before members of the staff of this Office from time to time, are conducted informally and no rules of procedure are followed. The hearings are usually held in the field by Examiners of Inheritance, and, for the most part, are conducted informally. The Act of June 25, 1910, provides that the Secretary of the Interior "upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."[25]

13. *Industrial Accidents.* The system of industrial insurance against injuries received in the course of employment, or workmen's compensation, as applied by Federal statute to Federal employes, is administered under the Act of Sept. 7, 1916, by the *United States Employes Compensation Commission.*[26]

This Commission is expressly relieved from the jury-trial rules by its organic statute, which also expressly exempts it from a particular rule most often encountered in proof of industrial injuries.[27]

14. *Internal Revenue.* (*a*)[28] Prior to 1924 all disputes arising between taxpayers and the Federal Government under the Internal Revenue Laws were submitted to and determined by the Commissioner of Internal Revenue. This officer was the administrator of last resort in the Treasury Department, and from him an appeal lay only to the Courts of the District of Columbia.

Hearings before the Commissioner were very informal and quite similar to arbitrations. The decisions of the Commissioner were not written, and necessarily they carried no authority as precedents; hence there was no body of law available for the guidance of the litigant. An additional, and perhaps the greatest, weakness in this system lay in the fact that an impartial determination of the dispute was difficult to obtain, inasmuch as the Commissioner not only sat in judgment upon the case, but also prepared and prosecuted it for the Government.

To remedy this situation, to add some degree of certainty to the litigation by providing for reported decisions, and to speed up the entire process, the Congress,

21. Decisions of the Comptroller-General (to vol. 17 in 1938).

The history and scope of this Office is given in the following: Darrell H. Smith, The General Accounting Office (Service Monograph No. 46, Brookings Institute for Government Research, Washington, 1927).

22. This Housing Sub-Committee publishes the various laws, orders, regulations and rulings, both Federal and State, on the subjects of its field, in the Housing Legal Digest (monthly, No. 1, Jan. 1936; Nos. 48-49, July-August 1938). It has not adopted any rules of procedure as such; but it has published numerous "Bulletins on Policy and Procedure," giving information applicable to loans, contracts, engineering, accounting, etc.

23. This generality has been developed in a series of decisions, too long for citation here, beginning with Lee Lung, Patterson, 186 U. S. 168 (1902), and culminating in U. S. ex rel. Bilokumsky, Tod, 263 U. S. 149, 157 (1924).

24. The history and scope of this Bureau is given in the following: L. F. Schmeckebier, The Office of Indian Affairs (1927; Service Monograph No. 48, Brookings Institute for Government Research, Washington).

25. Regulations relating to the Determination of Heirs and Approval of Wills (dated May 31, 1935). The procedure is elaborately set forth (47 sections); attorneys "are required to adhere to the rules of evidence in the State in which the evidence is taken, in presenting their cases."

The rulings are not published for general distribution. The Solicitor's opinions of law are published in Decisions of the Interior Department (cited "I. D."):

26. The history and scope of this Commission is given in the following: G. A. Weber, The Employees Compensation Commission (Service Monograph No. 12, Brookings Institute for Government Research, Washington, 1922).

27. St. 1927, Mar. 4, c. 509, § 23, U. S. Code 1926, tit. 33, § 923 ("The deputy commissioner shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure. . . . Declarations of a deceased employee concerning the injury . . . shall be received in evidence, and shall if corroborated by other evidence be sufficient to establish the injury"); 1932, Crowell *v.* Benson, 285 U. S. 22, 52 Sup. 285 (U. S. Employees' Compensation Commissioner, under U. S. Code tit. 33, § 923, is not bound by the usual rules of evidence).

28. The following paragraph is taken from a report prepared by *Robert T. Wright,* a member of the Illinois Bar.

The history and scope of this Bureau is given in the following: L. F. Schmeckebier and F. X. A. Eble, The Bureau of Internal Revenue (Service Monograph No. 25, Brookings Institute for Government Research, Washington, 1923).

in enacting the Internal Revenue Laws of 1924, created the *Board of Tax Appeals*.

Under this Revenue Act of 1924, proceedings before the Board and its divisions were conducted in accordance with rules of evidence prescribed by the Board itself. Thus during the period between its organization and the passage of the Revenue Act of 1926 the Board built up a sizable body of law relating to evidence. Some of the rules were substantially the same as those enforced in many courts. But in view of the fact that it was a tribunal without a jury the Board did not, as a rule, strictly enforce those rules of evidence which grew out of and are peculiarly applicable to jury trials. In the main, however, the Board applied rules of evidence more or less in accord with those which would govern in equity proceedings.

The Revenue Act of 1926, § 907*a*, p. 909, U. S. Code 1926, § 1219, provided that in all matters coming before the Treasury Department under the Internal Revenue Laws,[29]

"Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported, . . . The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia."

It is clear that certain evidence which was admitted under the Revenue Act of 1924 might be inadmissible under the new regulation; but the new standard has not operated generally to broaden the field of admissibility.

As might be expected, the questions of evidence with which the Board is confronted are generally speaking, not the same as those which arise in courts of general jurisdiction. A very large part of the evidence sought to be introduced before the Board is related to value, useful life, and certain other matters and issues more or less peculiar to tax law; whereas in only a relatively small percentage of usual court cases are these questions raised, and some of them have not, it seems, been settled by equity decisions in the District of Columbia. Nevertheless, since the common law is in force in the District of Columbia, as are also the general Acts of Congress which are not locally inapplicable, and all Acts by their terms made especially applicable to the District, the common law of evidence in equity, as shown by the decisions of courts generally, may be cited to the Board in the absence of other authorities.[30]

Since the Board of Tax Appeals is an independent body, virtually a court, having no connection with the Bureau of Internal Revenue or the Treasury Department, it does not have the Bureau files before it in deciding an appeal. It does not know, and of course cannot take judicial notice of, the evidence, if any, submitted by the taxpayer to the Bureau. The trial before the Board is "de novo," and the petitioner must introduce sufficient evidence to sustain the allegations of his petition, even though all of the same evidence has been presented to the Commissioner.[31]

(*b*) In the Treasury Department there is also a *Committee on Enrollment and Disbarment*, dealing wiht the enrollment of attorneys or agents practising in revenue matters, as well as (under St. 1935, Aug. 26, § 4) with the enrollment of custom house brokers—thousands of persons in all. They conduct hearings, and make rulings recommending admission or suspension or disbarment.[32] For the practice by such persons in the Bureau of Internal Revenue, the proceeding is termed a "conference" (not a "hearing"); any taxpayer or his duly authorized representative may be "accorded a conference," and there are a few rules applicable to presentation of his evidence.[33]

(*c*) The revenue laws for alcoholic beverages are administered by the *Federal Alcohol Administration* (in the Treasury Department). Under the statute (1935, Aug. 29, § 4, par. *h*), the denial or suspension or revocation of permits comes before the Administrator for a hearing, and his finding of facts "if supported by substantial evidence" is conclusive. He administers the provisions of the Act governing the conduct of licenses as to "exclusive outlet," "tied house," commercial brib-

29. St. 1928, c. 852, Revenue Act, § 601, repeats this provision, so also Rule 31 in Rules of Practice before the United States Board of Tax Appeals (14th ed. 1938); Rules 31 to 46 have some important provisions as to burden of proof, depositions, etc.

30. The following rulings have been made in the Federal circuits: 1930, Budd *v.* Commissioner, 3d C. C. A., 43 Fed. 2d 509 (Board of Tax Appeals; there must be some "competent and substantial evidence"); 1931, Dempster Mfg. Co. *v.* Burnet, 60 D. C. App. 23, 46 Fed. 2d 604; 1932, Uncasville Mfg. Co. *v.* Com'r of Internal Revenue, 2d C. C. A., 55 Fed. 2d 893 (U. S. Code tit. 26, § 1219, requiring the Board of Tax Appeals to follow the rules of evidence in equity in the District of Columbia, construed; the Board need not accept the taxpayer's own testimony to the value of his property); 1936, Whitlow *v.* Commissioner, 8th C. C. A., 82 Fed. 2d 569 (valuation of notes for income tax; such tribunals may "depart from the rules of evidence enforced in the courts").

31. The practice before the Board can be ascertained from the following sources: Rules of Practice, etc., cited *supra;* Treasury Decisions under Internal Revenue Laws, 1900+ (vol. 34 in 1938); Internal Revenue Bulletin (rulings; vol. 17 in 1938); U. S. Board of Tax Appeals Reports, vol. 1 (1924), and later; C. D. Hamel, "U. S. Board of Tax Appeals," ch. IV, Practice and Evidence (1926); U. S. Commissioner of Internal Revenue, "Annual Reports"; C. D. Hamel & E. H. McDermott, "Manual of Board of Tax Appeals Practice" (1929; chaps. VIII to XV deal with rules of Evidence); J. Gilmer Korner, "The U. S. Board of Tax Appeals" ("In the division the hearings are conducted substantially as in the courts, except that there is no jury. Because there is no jury, the strict rules of evidence obtaining in law courts are relaxed, and the rules of evidence observed are more nearly those obtaining in courts of equity"; American Bar Ass'n Journal, XI, 643, Oct. 1925).

The Commerce Clearing House Co. has two services covering Federal tax practice in the Bureau of Internal Revenue and under the Board of Tax Appeals: (1) "BTA Index Digest Service": presenting digests of all of the Board of Tax Appeals decisions issued by the Board in its official reports; a topical index of digests, organized in subject groups, with official BTA volume references and CCH decision numbers; the Service consists of the Index-Digest Volume, containing an official topical index and digest of the decisions reported the BTA reports; and the Index-Digest Supplement presenting the current indexes of BTA decisions, including memorandum decisions. (2) "Standard Federal Tax Service" (five volumes annually): now in its twenty-fifth year; compiling all pertinent law, regulations, decisions and rulings: this Service includes a comprehensive Citator of Court and Board of Tax Appeals decisions, Illustrative Cases, Rewrite Bulletins, full texts of new court decisions and rulings, digests of all reported Board decisions.

32. Treasury Department Circular No. 230 (1936; revised from time to time), "Regulations governing the Recognition of Agents, Attorneys, and Other Persons representing Claimants before the Treasury Department and Offices thereof"; Sect. 7, par. 6; "Testimony" ("Subject to these Regulations, the Committee may determine . . . the form in which evidence may be received, and may adopt rules of procedure," etc.).

Treasury Department Circular No. 559 (April 16, 1936), "Rules and Regulations relating to Customhouse Brokers"; Section 10, Revocation or Suspension of Licenses, Section 13, Appeal (quoting the Tariff Act 1930), 641, par. 6; "the finding of the Secretary of the Treasury as to the facts, if supported by substantial evidence, shall be conclusive."

33. Conference and Practice Requirements, Bureau of Internal Revenue, U. S. Treasury Department (ed. 1936).

ery, consignment sales, labeling, advertising, etc.—all this under regulations of the Secretary of the Treasury.[34] His hearings are conducted "as will best serve the purpose of attainment of justice and dispatch" (Art. IV, Sect. 1), but he must "apply at the hearing the rules of evidence applicable in courts of equity of the United States, except that he shall relax such rules whenever in his judgment the ends of justice will be served thereby."

15. *Labor Relations.* Three independent agencies here exercise authority.

(*a*) The administration of the Federal statute regulating unfair practices in labor relations is placed in the hands of the *National Labor Relations Board,* which is empowered "to prevent any person from engaging in any unfair labor practice affecting commerce." The Board entertains complaints and holds hearings, and "in any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." Its findings of fact "if supported by evidence shall be conclusive."[35] The Board makes its own regulations. A few of them (Rules 20-31) deal with elementary matters of publicity, subpoenas, etc.; but one of them (Rule 31) introduces an extarordinary feature unknown to any Anglo-American court of justice, viz.: that "the refusal of a witness at any such hearing to answer *any* [!] question which has been ruled to be proper shall be ground for the striking out of all testimony previously given by such witness on related matters."[36]

There are also three so-called Boards, forming part of the Conciliation Service of the Department of Labor, viz., the National Steel Labor Relations Board, the Textile Labor Relations Board, and the National Longshoremen's Board; but their semi-judicial activities do not appear to have led to the formulation of rules of practice before them.

(*b*) The *National Mediation Board,* an independent agency created by the Act of June 21, 1934 (amending the Railway Labor Act), supplants the former United States Mediation Board created by the Act of May 20, 1926. Carriers by air are added to its jurisdiction by the Act of April 10, 1936. The duty is to act for the prompt disposition of disputes arising between the carriers and their employes.

But this Board has no printed rules of procedure or practice, issues no rulings or decisions, and holds hearing only in disputes involving who shall participate in representation elections and interpretations of mediation agreements negotiated with the assistance of the Board's mediators.

(*c*) The Fair Labor Standards Act (June 25, 1938, Pub. No. 718) formulates rules for minimum wages and maximum hours of labor in interstate commerce, and commits the administration of the Act to a *Wage and Hour Division* (in the Department of Labor) under an Administrator, who delegates more or less of his duties to Industry Committees. These Committes may hold hearings, summon witnesses, and make recommendations to the Administrator. The Act itself provides some elemental rules for hearings and for Court review; and the Administrator's findings of fact "when supported by substantial evidence shall be conclusive."

The rules and regulations are published in mimeograph releases (as well as in the Federal Register); and numerous interpretative bulletins, as well as rulings are published in mimeograph releases.[37]

The child labor provisions of the Act are committed to the Chief of the Children's Bureau (in the Department of Labor) for administration, and this Bureau issues its own regulations of procedure for those subjects committed to its authority.[38]

34. Regulations No. 1, relating to the Issuance, Revocation, Suspension, and Annulment of Basic Permits (Oct. 1935, Treasury Department, Federal Alcohol Administration).

The Commerce Clearing House Co. issues a Liquor Control Law Service (special volumes; reports the full text of laws passed by State legislatures and Congress on the subject of alcoholic liquors, including beer, wine, and spirits; it also reports, in full text, regulations and rulings issued by the administrative authorities, with annotated Topical Digests of laws and regulations, Topical Indexes, and Cumulative Indexes to new matters.

35. St. 1935, July 5, National Labor Relations Act, sect. 10.

The following rulings have interpreted the provisions about rules of evidence: 1938, National Labor Relations Board *v.* Bell Oil & Gas Co., 5th C. C. A. 98 Fed. 2d 406 (on an issue of the cause for failure to re-employ an employe, certain hearsay evidence was made the basis of the Board's ruling; after citing Sect. 10 above, the opinion proceeds: "Unless supported by relevant and material evidence, the findings of the Board as to the facts are not conclusive. While technical rules of evidence which thwart justice should be abolished, it would be impossible for courts to function if all limitations upon the scope of evidence were removed. To stop needless delays, expedite business, and keep prejudice from creeping into the trial, it is necessary for courts to stay within the bounds of relevancy. Fair rules of evidence are essential in a judicial hearing. Without them, the proceeding is more or less of an inquisition." 1937, National Labor Relations Board *v.* Lion Shoe Co., 1st C. C. A., 97 Fed. 2d 448 (though the Board is not bound by the usual rules of evidence, this does not change the principle requiring reasonable deductions from evidence).

1938, National Labor Relations Board *v.* Bell Oil & Gas Co., 5th C. C. A., 98 Fed. 2d 870 (on motion for a rehearing; Holmes. J.): "We held in this case that the rules of evidence prevailing in courts of law and equity were not abolished by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. We adhere to this ruling, notwithstanding the provision that, in proceedings before the Board, such rules shall not be controlling. * * * The fact that incompetent evidence is heard does not invalidate an order of the Board, provided the findings upon which the order is based are supported by competent, relevant, and material evidence. * * *

"The provision in paragraph (b), section 10, 29 U.S.C.A. § 160(b) with reference to the rules of evidence prevailing in courts of law and equity not being controlling, means that it is not error for the Board to hear incompetent evidence. It does not mean that a finding of fact may rest solely upon such evidence. Whether there be any competent evidenec to support the findings of the Board is a question of law; whether it is sufficient is a question of fact. The decision of the Board upon a question of law is not conclusive in this court. In one instance, in the case under review, the sole evidence to support an essential finding of the Board was the incompetent evidence quoted in our opinion. In the others, there was no substantial evidence to support essential findings. Therefore, as a matter of law, the order was deemed invalid."

1938, Dec. 5, Consolidated Edison Co., National Labor Relations Board,—U. S.—, 59 Sup.—(quoted *supra* in the text).

36. National Labor Relations Board, Rules and Regulations, Series 1, as amended (to April 27, 1936).

The rulings of the Board are reported in Decisions and Orders of the National Labor Relations Board (vol. 31 in 1938). Judicial decisions on appeal appear in the Federal Reporter. The opinions, leading later to public discussion at the Bar, in Morgan *v.* U. S., 304 U. S. 1, 58 Sup. 999, and In re Petition of National Labor Relations Board *v.* U. S. 58 Sup. 1001, concerned procedure in general, and not the rules of evidence.

The Commerce Clearing House Co. furnishes a Labor Law Service (one volume, continuing), the National Labor Relations Act, the Federal Anti-Injunction Act and other important Federal labor laws reported in full text; annotated compilations, with court decisions and Committee hearings, on the Labor Relations Act and Anti-Injunction Act; National Labor Relations Board rules, regulations and decisions.

37. Series One, Rules and Regulations, dated Sept. 22, 1938, contains some simple rules for the procedure of the Industry Committees in reaching their recommendations.

38. Regulation No. 1, Certificates of Age, Oct. 14, 1938; Regulation No. 5, Procedure governing determination of Hazardous Occupations, Nov. 4, 1938.

16. *Patents.* In the Patent Office (Department of Commerce), the jury-trial rules are nominally in force, by departmental regulation—abstractly so declaring, but permitting undefined flexibility.[39] But the Federal Courts do not appear to regard the rules as compulsory;[40] and in practice they are rarely invoked, either in the Office rulings or in the Court of Appeals.[41]

The jurisdiction in *patent appeals* (except in equity in the District of Columbia Court of Appeals) is consolidated with the jurisdiction in customs appeals, in a court entitled the United States Court of Customs and Patent Appeals;[42] but this Court makes no evidence rules of its own.[43]

17. *Petroleum.* The *Petroleum Conservation Division,* in the Department of the Interior, administers the Act of Feb. 22, 1935, which prohibits the shipment in interstate or foreign commerce of petroleum or its products in excess of the amount permitted by State laws.

The Act of Feb. 22, 1935 (Connally Act) provides for boards to enforce the provisions by issuing "certificates of clearance," i.e. certificates determining that the petroleum "does not constitute contraband oil." Exeeutive Orders of Dec. 1, 1937, establish regional Federal Tender Boards, and each Board is authorized to make regulations governing its procedure and is empowered to summon witnesses; its finding of facts "if supported by evidence, shall be conclusive," with review by the courts.[44]

18. *Postal Service.* The Post Office Department, under the Postmaster General, is charged by numerous Acts of Congress with a variety of activities affecting the individual citizen. It awards contracts for mail transportation; hears complaints against the conduct of postmasters; manages the money order service, the postal savings service and the parcel post service; investigates unlawful use of the mails (lotteries, explosives, extortion, fraud, etc.) and claims for damage to person or property.

The principal subject calling for hearings under these statutes is the use of the mails to defraud (U. S. Code tit. 39, §§ 259, 732; including lotteries). The prohibition of this statute is enforced by the Postmaster General issuing an instruction to postmasters receiving such mail-matter "to return all such mail matter" to the post office of origin, stamped with the word "fraudulent." But due opportunity for hearing is always given before the issuance of such an order; and though no formal rules of procedure have been published, the practice is thus described by the Solicitor's Office:[45]

"The statutes provide that the Postmaster General may, upon evidence satisfactory to him, issue a fraud order; they do not expressly require the holding of hearings. However, during the past forty or fifty years it has been the invariable custom to hold hearings in these cases. The Department has no authority to subpoena witnesses, and it is therefore impracticable to adhere to the strict rules of evidence in the conduct of these hearings. The burden of proof is on the Government. Testimony is taken under oath, and an effort is made to receive only such evidence as may be reasonably relied upon. The practice with respect to the reception of evidence in these cases is very similar to that described in the recent opinion of the Supreme Court of the United States in *Consolidated Edison Company of New York* v. *National Labor Board,*—or in other words, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' is received. Considerable latitude is afforded respondents in the presentation of evidence in these cases, and every effort is made to afford respondents full opportunity to prepare and present their defenses in order that no injustice may be done.

"So-called 'fraud order' cases are set down for hearing on practically every working day throughout the year. These cases usually arise on complaint of

(*Continued on page 70*)

39. 1936, Rules of Practice in the U. S. Patent Office (Rule 159: "Evidence touching the matter at issue will not be considered on the hearing which shall not have been taken and filed in compliance with these rules. But notice will not be taken of merely formal or technical objections which shall not appear to have wrought a substantial injury to the party raising them. . . . This rule is not to be so construed as to modify established rules of evidence, which will be applied strictly in all practice before the office." Rules 154 to 162 deal with the taking of testimony.

The rulings are published in the Official Gazette of the Patent Office and are collected in the following series: Decisions of the Commissioner of Patents and of the U. S. Courts in Patent, Trademark, and Copyright Cases, 1869+ (by years without volume number).

The history and scope of this Office is given in the following: G. A. Weber, The Patent Office (Service Monograph No. 31, Brookings Institute for Government Research, Washington, 1924).

40. 1859, Spear *v.* Abbott, C. C. D., Fed. Cas. 13, 222 (appellant maintained that the commissioner of patents had erroneously received in rebuttal certain depositions due to be offered in chief; Dunlop, C. J.: "Appellant invokes the protection of the rules of practice in the courts of England and this country in the trial of common-law causes before a jury; . . . but the rule has no application in equity or admiralty, or in any other than a common-law tribunal in jury causes").

41. The following was the only gleaning from a few volumes of Patent Office Decisions, taken up casually: 1913, Goldschmidt *v.* Von Schutz, 192 Off. Gaz. 743, Decisions Com. Patents, 1913, p. 159 (rule admitting only rebuttal testimony in rebuttal).

42. St. 1929, Mar. 2, c. 488, U. S. Code 1926, tit. 28, § 301 (this Court "shall prescribe the forms of its writs and other process and procedure," Code § 307).

43. 1937, Rules of the United States Court of Customs and Patent Appeals. The decisions are reported in the Federal Reporter; but the Code, § 305, directs the reporter of the Court to publish a digest of its decisions at least once a year, and these are published in the series Customs and Patent Appeals Reports (vol. 25 in 1938), alternate volumes being devoted to Customs and to Patents.

44. The Petroleum Conservation Division issues a photostat circular containing copies of the Act and the Executive Orders.

45. From a MS. letter of the Solicitor's Office, W. E. Kelly, acting solicitor.

The findings of fact in such cases are published in mimeograph when the case is one of general interest.

The opinions of the Solicitor, rendered to various officials on questions of law arising in the service, have been published in a series now numbering eight volumes (VIII, 1937).

The judicial rulings passing upon the procedure and evidence in fraud order cases include the following: American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Aycock v. O'Brien, 28 F. (2d) 817; Bates and Guild Co. v. Payne, 194 U. S. 106; Branaman v. Harris, 189 Fed. 461; Crowell v. Benson, 285 U. S. 22; Davis v. Davis, decided Nov. 7, 1938, No. 16, present term; Degge v. Hitchcock, 35 App. D. C. 218, aff'd, 229 U. S. 162; Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568; Harrison v. United States, 200 Fed. 662; Hurley v. Dolan, 297 Fed. 825; Leach v. Carlile, affirming 207 Fed. 61, 258 U. S. 138; Missouri Drug Co. v. Wyman, 129 Fed. 623; Morgan v. United States, 304 U. S. 1; National Conference on Legalizing Lotteries, Inc. v. Farley, 96 F (2d) 861, certiorari denied, Oct. 10, 1938, No. 223; New v. Tribond Sales Corporation, 19 F. (2d) 671; Oesting v. United States, 234 Fed. 304, certiorari denied, 242 U. S. 647; People's United States Bank v. Gilson, 161 Fed. 286; Plapao Laboratories, Inc. v. Farley, Postmaster General, 92 F. (2d) 228, certiorari denied, 302 U. S. 732; Public Clearing House v. Coyne, 194 U. S. 497; Quon Quon Poy v. Johnson, 273 U. S. 352; Silberschein v. United States, 266 U. S. 221.

BAR PRESENTS RESOLUTIONS IN MEMORY OF JUSTICE CARDOZO TO THE SUPREME COURT

REMARKS OF ATTORNEY GENERAL CUMMINGS IN PRESENTING RESOLUTIONS

MAY it please the Court: The members of the Bar of this Court on November 26, 1938, met in this room to express their sorrow at the death of Mr. Justice Cardozo. At that meeting moving tributes were paid to his memory; and the following resolutions were adopted:

"The members of the Bar of the Supreme Court of the United States, meeting in the Court Building Saturday, November 26, 1938, on the call of the Solicitor General, speak for the bar of the Nation in expressing their sorrow at the untimely death of Mr. Justice Cardozo. No formal memorial can give an adequate sense of his mental powers or his spiritual qualities. Only the barest outline of his career and an indication of its significance can be attempted.

"Benjamin Nathan Cardozo was born in New York City May 24, 1870, and died at the house of his intimate friend, Judge Irving Lehman, in Portchester, New York, July 9, 1938. He was the younger son of Albert and Rebecca Nathan Cardozo, both of whom were descended from Sephardic Jews who had been connected with the Spanish and Portuguese Synagogue in New York from before the Revolution. He graduated from Columbia College at the age of nineteen and received his master's degree the following year while attending the Columbia Law School. He did not stay for a degree in law, and was admitted to the Bar in 1891. For twenty-two years he pursued what was essentially the calling of a barrister, unknown to the general public but quickly gaining the esteem of the Bar and the Bench of New York. His devotion to the law as a learned profession he proved in his daily practice and by his illuminating book on the Jurisdiction of the Court of Appeals of the State of New York published in 1903.

"In 1913 he was elected a Justice of the Supreme Court. A month later, on the request of the Court of Appeals, Governor Glynn designated him to serve temporarily as an Associate Judge of that Court. In January, 1917, he was appointed a regular member by Governor Whitman, and in the autumn was elected for a term of fourteen years on the joint nomination of both major parties. In 1927 he was elected without opposition Chief Judge.

"As he was a lawyers' lawyer, so he was a judges' judge. For eighteen years by his learning and the felicity of his style he added distinction to the New York Court of Appeals, and his dominant influence helped to make that court the second tribunal in the land. During this period his philosophic temper expressed itself more systematically than legal opinions permit in four volumes, slender in size but full of imaginative insight, upon the relations of law to life. These are: The Nature of the Judicial Process, The Growth of the Law, The Paradoxes of Legal Science, and Law and Literature.

"The New York Court of Appeals, with its wide range of predominantly common law litigation, was a natural field for Judge Cardozo. No judge in our time was more deeply versed in the history of the common law or more resourceful in applying the living principles by which it has unfolded; and his mastery of the common law was matched by his love of it. It was, therefore, a severe wrench for him to be taken from Albany to Washington. Probably no man ever took a seat on the Supreme Bench so reluctantly. But when Mr. Justice Holmes resigned in 1932 President Hoover's nomination of Chief Judge Cardozo was universally acclaimed. In selecting him the President reflected the informed sentiment of the country that of all lawyers and judges Cardozo was most worthy to succeed Holmes.

"It was a grievous loss to the Court and the Nation that fate should have granted him less than six full terms on the Supreme Bench. That in so short a time he was able to make such an enduring impress on the constitutional history of the United States is a measure of his greatness. To say that Mr. Justice Cardozo has joined the Court's roll of great men is only to anticipate the assured verdict of history. His juridical immortality is due not to the great causes that came before the Court during his time, but to his own genius. With astonishing rapidity he made the adjustment from preoccupation with the comparatively restricted problems of private litigation to the most exacting demands of judicial statesmanship. Massive learning, wide culture, critical detachment, intellectual courage, and exquisite disinterestedness combined to reinforce imagination and native humility, and gave him in rare measure the qualities which are the special requisites for the work of the Court in whose keeping lies the destiny of the Nation.

"Accordingly it is resolved that we express our profound sorrow at the death of Mr. Justice Cardozo, and our gratitude for the contributions of his life and work, the significance of which will endure so long as the record of a consecrated spirit has power to move the lives of men, and the Law shall be the ruling authority of our Nation.

"Be it further resolved that the Attorney General be asked to present these resolutions to the Court and to request that they be entered in its permanent records."

It is my privilege to present these resolutions and to ask that they be entered in the permanent records of this Court.

In discussing the judicial work of Mr. Justice Cardozo, I speak, however haltingly, for the bar of the nation; I feel that in a measure I speak also for the nation itself. A great judge leaves his mark not only on the law which he serves but also on the life of the people. Not until future generations of scholars have traced the course of the law in its constant search for justice will the full scope of his great service be revealed. But we can today with all certainty say that

he opened ways along which a free people may confidently tread.

For eighteen years Judge Cardozo sat on the Court of Appeals of New York State. It was an eminent court when he came to it; when he left it was the greatest common law court in the land. Throughout this long period, as its members have been quick to say, the court drew heavily upon the inexhaustible learning, the clarity of analysis, and the boldness of thought of their gentle brother. The peculiar influence of Cardozo, however, spread far beyond the conference room. To lawyers and to courts his opinions were more than a record of the judgment. They spoke with the majestic authority of an analysis which reached to the bed rock of the learning of the past and yet was attuned to the needs of the living. And always the opinions spoke in tones of rare beauty. They might deal with things prosaic, but the language, lambent and rich, was that of a poet.

Opinions in the New York court are assigned by rotation, yet during the years of his service there an exceptionally large number of its great opinions were those of Judge Cardozo. There were few branches of the law that were not quickened by his touch. Significantly, his most notable contributions to the common law are found in fields which had long before settled into fixed forms. No other judge of his time was so deft in weaving the precedents of centuries into a new shape to govern a new society. This is the heart of the common law process, but only a master can fashion a new rule and yet preserve the essential truth of the older decisions.

To Judge Cardozo the law was meant to serve and not to rule the institutions which it sheltered. No one saw more clearly than he that the imperfect rules of today may stir equities that become the law of tomorrow. In the law of torts, one need only mention on the one side *MacPherson* v. *The Buick Company*,[1] where the law as to negligent manufacture was at last brought abreast of modern methods of distribution, and, on the other side, the *Palsgraf* case,[2] where the notion of "negligence in the air" received its classic castigation. The impact of Judge Cardozo on contract law is typified by the *Duff-Gordon* case,[3] where a contract was enforced because the obligations although not express were fairly to be implied. "The law," he said, "has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Minor and unintentional defaults in a complicated construction contract, Judge Cardozo held in another case,[4] are not to be subjected to a syllogistic rule whose premises are found in the far simpler contracts of another age. There must be no sacrifice of justice, the opinion reads, whatever may be the doubts of "those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result * * *."

Throughout these opinions one traces their animating current, the one passion of this gentle and retiring man, that the courts should never fail to use the law to promote justice. While few judges have been so ready to adapt the law to the changing organization of the business world, he steadfastly refused to sanction any relaxation in the morals of the market place. It is likely that most real estate operators would not consider that their duty to their joint-venturers extended so far as to share the opportunity to start anew at the conclusion of the venture. But, in the case of *Meinhard*,[5] Chief Judge Cardozo refused to sanction even so slight a deviation from "an honor the most sensitive." As he writes, the ease of the philosopher changes into the inner fire of the prophet. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In 1932 Chief Judge Cardozo was at the head of the foremost common law court of the land. His court was but rarely forced to plunge into the elusive statesmanship of constitutional law; it was a court of legal craftsmen. He was warmed by the deep friendship of his colleagues. Neither he nor any student of the common law could have wanted more than that he fill out his days in such a fruitful serenity.

But in that year Justice Holmes resigned. For thirty years, he had enriched the work of this great Court and, by the same token, the legal thought of the Nation. To succeed Justice Holmes there could be but one man. President Hoover spoke for the whole people when he offered the nomination to Chief Judge Cardozo. With reluctance, and through a selfless obedience to the higher duty, Judge Cardozo accepted the call and took his seat on this Court on March 14, 1932.

His first opinion for the Court appears in the 286th volume and his last opinion in the 302nd volume of the reports.[6] The span is tragically short. But in these brief years Justice Cardozo has notably enriched the history of jurisprudence. To this Court he brought his deep learning in the law and to the solution of its vexing problems he lent a tolerance and a generous understanding which have rarely been equalled.

He made the transition from New York to this Court with an ease which seemed effortless. The large questions of constitutional law, the unexplored vistas of administrative law, and the complexities of federal taxation, were each beyond the ordinary range of litigation in the Court of Appeals. Yet, from the very beginning, his touch was as sure and his vision as far-ranging as it had been in the familiar rooms at Albany.

To the specialized fields which provide much of the work of this Court, Mr. Justice Cardozo brought rare skill with the technical tools of the lawyer and an insistent belief that the law failed when it offered reward to chicanery or greed. A complicated question of tax limitation[7] was solved by "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." He differed with the majority of this Court in the *Securities and Exchange Commission* case,[8] perhaps less because of his analysis of the statute than for fear that it would "become the sport of clever knaves." If the registration procedure is not to "invite the cunning and unscrupulous to gamble with detection," he continued,

1. *MacPherson* v. *The Buick Motor Co.*, 217 N. Y. 382.
2. *Palsgraf* v. *Long Island Railroad Co.*, 248 N. Y. 339.
3. *Wood* v. *Duff-Gordon*, 222 N. Y. 88, 91.
4. *Jacob & Youngs* v. *Kent*, 230 N. Y. 239, 242.
5. *Meinhard* v. *Salmon*, 249 N. Y. 458, 464.
6. In these six years, Mr. Justice Cardozo wrote 128 majority opinions, 2 concurring opinions and 24 dissenting opinions; in addition, he collaborated in 7 concurring and 10 dissenting opinions.
7. *Stearns Co.* v. *United States*, 291 U. S. 54, 61-62.
8. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 32.

"when wrongs such as these have been committed or attempted, they must be dragged to light and pilloried."

But it is in the larger reaches of public law that the broad vision of Mr. Justice Cardozo found full scope. The commentators may dispute as to whether the judge who decides these questions must be more the statesman or the lawyer. But none has doubted that Mr. Justice Cardozo was rarely gifted with both qualities.

The novel problems presented by administrative law received from him a sympathetic and discerning treatment. He never forgot that administrative agencies were born of a need for developing a technique which differed from judicial litigation. He has written, for the Court, that "the structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself."[9] He saw, too, that these agencies act in a field where substantial accuracy is immeasurably preferable to the complete frustration which would result were an absolute precision sought. The Interstate Commerce Commission, faced with the task of valuing railroads, he said, may recognize that "in any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty."[10] For him the respect to be paid the findings of the administrative tribunal was an imperative rule of decision, not to be satisfied by a verbal recognition. He has placed a decision of the Court on the ground that the lower court, "though professing adherence to this mandate, honored it, we think, with lip service only."[11]

The same quality appears when he considers the validity of state legislation. There could be no tolerance for state regulation which, as he said in the *Seelig* case,[12] by setting "a barrier to traffic between one state and another," "would neutralize the economic consequences of free trade among the states." But, so long as the state action contained no threat to national solidarity, it could not properly, Mr. Justice Cardozo felt, be nullified by this Court unless the Constitution spoke to the contrary with unmistakable clarity. When this Court held invalid a state sales tax, graduated according to volume, in the *Stewart Dry Goods* case,[13] Mr. Justice Cardozo entered eloquent protest. The legislation, he said, was "a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia."

Few men have, with such whole-hearted humility, practiced that tolerance for human experimentation which many feel must be the hall-mark of a great constitutional jurist. But none knew better than Mr. Justice Cardozo that, when the question was one of personal liberty rather than the economic judgment of the legislature, vigilance rather than obeisance must be the order of decision. Of freedom of thought and speech, he wrote in one of his last opinions for the Court,[14] "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." He has elsewhere said:[15] "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." And then follow these majestic words: "We may not squander the thought that will be the inheritance of the ages."

Perhaps the most nearly ultimate field upon which a Justice of this Court must venture is that of measuring the Acts of the Congress against the requirements of the Constitution. Mr. Justice Cardozo sat during six of the most momentous years in the history of this Court. Throughout these years the familiar rules which forbid the Court from passing judgment on the wisdom of the Congress were to him not aphorisms, but burning truths. He found, in his own words,[16] a "salutary rule of caution" in that "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion." Mr. Justice Cardozo viewed the Constitution as directed to the great end of preserving a democratic government for a free people. This high purpose is defeated if the courts view the Constitution as dictating choice, as he has stated it, in "a situation where thoughtful and honest men might see their duty differently."[17] His consistent deference to the judgment of the legislature came not merely from the humility of his nature. It arose also from his profound conviction that, as he put it,[18] "one kind of liberty may cancel and destroy another," and that "many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle." Thus, where an industry was so glutted by ruthless overproduction that its survival was threatened, Mr. Justice Cardozo saw nothing in the Constitution which forbade the Congress to act, for, as he said in the *Carter* case,[19] "The liberty protected by the Fifth Amendment does not include the right to persist in * * * anarchic riot."

Mr. Justice Cardozo found no constitutional barrier to prevent the enactment of legislation which was compelled by the urgent needs of an ever changing society. "The Constitution of the United States," he wrote in his dissent in the *Panama Refining* case,[20] "is not a code of civil practice." The commerce power, he has said, "is as broad as the need that evokes it."[21] The basic constitutional doctrine of separation of powers was for him not "a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety."[22]

9. *Miss. Valley Barge Co.* v. *United States*, 292 U. S. 282, 286.
10. *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 205.
11. *Fed. Trade Com'n* v. *Algoma Co.*, 291 U. S. 67, 73.
12. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521, 526.
13. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 577.
14. *Palko* v. *Connecticut*, 302 U. S. 319, 327.
15. *Mr. Justice Holmes*, 44 Harv. Law Rev. 682, 688.
16. Dissenting in *United States* v. *Constantine*, 296 U. S. 287, 299.
17. *Mayflower Farms, Inc.*, v. *Ten Eyck*, 297 U. S. 266, 276.
18. *Mr. Justice Holmes*, 44 Harv. Law Rev. 682, 687-688.
19. Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 331.
20. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 447.
21. Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328.
22. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 440.

Thus far I have spoken of our friend as a lawyer and a judge. This imperfect tribute leaves untouched the far reaches of his mind and character. I have not trusted myself to speak of these things. They are so intimate and so beautiful that they quite transcend the limits of our common speech. It is better, I think, to rest upon the words of Justice Holmes who, in tenderness and affection, said that Judge Cardozo was "a great and beautiful spirit."[23]

It was eminently fitting that Mr. Justice Cardozo should have been chosen to deliver the opinion of the Court in the Social Security cases. The governmental process must have seemed noblest to him when it was directed to the relief of the aged, the infirm, and the destitute. His words seem to have sprung from the heart of one who felt with intensity that government succeeds only as it serves the needs of its people: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. * * * The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."[24]

Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold.

REMARKS OF CHIEF JUSTICE HUGHES IN RESPONSE TO PRESENTATION OF THE RESOLUTIONS

CHIEF JUSTICE HUGHES said: Mr. Attorney General:—The tribute in the resolutions you present comes most fittingly from the members of the Bar who find the ideals of their profession realized in a career of extraordinary worth. It is of special significance at this time that these sentiments of lawyers will find a warm response in the hearts of millions of our fellow countrymen who, without learning in the law, have a keen sense of the public benefit that has come from the quiet, unselfish and humane labors of a great jurist working in the public interest with a consuming zeal. We, his brethren of the Court,—still awestruck by the fate which brought his career to such an untimely and tragic end—receive this tribute with hearts burdened by the sense of loss of that personal association which was to us a priceless privilege.

Benjamin Nathan Cardozo was city-born and bred. He was reared not in the wide open spaces but within the narrow confines of the great metropolis. But his horizon knew no urban bounds and his vision took in all the circumstances and needs of our country with complete understanding. His urban training made him familiar with some of the most serious problems of our democracy and gave him special alertness to detect every sort of wrong, however cunningly disguised by conventional or tolerated forms. The passion for justice which characterized his work had its roots in what he early perceived in his metropolitan environment and never forgot.

It would be difficult to find a life so completely and uninterruptedly devoted to pursuits congenial to talent. While enjoying the resources and interests of a cultivated taste, it was to the study of the law—its learning, its processes, and its adjustments—that he bent his energies and he reaped the hard-won rewards of the most distinguished scholarship. He was singularly immune from either the enticements or the demands of activities foreign to strictly professional labors. He did not seek public office. He stood aloof from politics. He did not engage in public controversies or aspire to leadership in organized social efforts. He did not crusade for social reforms. His zeal for human betterment took a direction better suited to his temperament and intellectual interests. He shrank from promiscuous contacts, finding a safe refuge in his books.

Even at the bar, he was spared the stormy conflicts of jury trials and the contests which evoked passion and animosities. Early distinguished for his ability in analysis and his force and felicity of expression, his professional opportunities lay in briefs and arguments in cases in equity and in appellate courts,—in cases requiring particular skill in the illumination and solution of legal problems, where advocacy needed the resources of the industrious scholar. During his twenty or more years at the bar he neither sought nor had public acclaim. But he deeply impressed his brethren of the profession and on that solid reputation his future was built.

It was evident to all who knew him that he would be an ideal judge and in truth it was his friends of the bar who procured his nomination and made sure his election as a judge of the Supreme Court of New York, the highest court of original jurisdiction in that State. It was equally plain that his best service would be in an appellate court, and almost immediately he was designated to serve in the highest court of the State and there by subsequent choice of the electorate as Associate Judge and Chief Judge he remained for about eighteen years. His work in the Court of Appeals of New York made him renowned throughout the country. It was service of the highest judicial quality in learning, in skill, in exposition, in outstanding contributions to the development of the law. In the field of the common law, his learning gave him the freedom which comes with mastery, as he utilized its processes to secure its intelligent adaptation to the needs of his time. Modest, sensitive and retiring, he was still a mighty warrior for his convictions and in his expert hands the pen became a sword wielded with devastating power.

When Mr. Justice Holmes retired in 1932, the country, led by the bar, with one voice urged his appointment to this Court. And here he sat for over five eventful years. In the proceedings which led to the adoption of the resolutions you have presented, Mr. Attorney General, the opinions of Mr. Justice Cardozo —those which he wrote and those in which he concurred—have largely been considered. This is not a

23. Letter to Dr. John C. H. Wu, printed in Holmes, *Book Notices, Uncollected Papers, Letters* (Shriver), p. 202.

24. *Helvering* v. *Davis*, 301 U. S. 619, 641.

fitting occasion for a critique. It is sufficient to say that no judge ever came to this Court more fully equipped by learning, acumen, dialectical skill, and disinterested purpose. He came to us in the full maturity of his extraordinary intellectual power, and no one on this bench has ever served with more untiring industry or more enlightened outlook. The memory of that service and its brilliant achievements will ever be one of the most prized traditions of this tribunal. Mr. Justice Cardozo in one of his penetrating discussions observed: "If I consult my own experience, and ask what judges do in building law from day to day, I find that for the average run of cases what our predecessors have *said* is a generative force quite as much as what they have done." He meant what had been said, not by way of mere *dictum*, but what had been said "as the professed and declared principle dictating the conclusion." With the same thought he emphasized the "exceptional cases" when "the creative function is at its highest." And I have no doubt it is not so much the specific rulings in the opinions of Mr. Justice Cardozo but what he said in arriving at the rulings that will be found to be a constantly active generative force in working out the decisions of the future. He has left a great arsenal of forensic weapons.

Mr. Justice Cardozo was devoted to our form of government and to him our constitutional guarantees of essential liberties constituted a heritage to be defended at all costs. With rare insight into our social problems and with vivid imagination, what he thought and sought to enforce was built upon the foundation of profound study. The idea that "sentiment or benevolence or some vague notion of social welfare becomes the only equipment needed" was an illusion. "Nothing," he said, "can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past." "This," he added, "is the raw material which we are to mould."

That process of "moulding," he not only brilliantly illustrated in his judicial opinions, but he subjected it to the most rigorous analysis. The function of the judge in the shaping of the law was for him a subject of perennial fascination, to which he ever returned with a clarity and comprehensiveness of exposition which placed him in the front rank of writers on the philosophy of law,—its nature and its growth. In his view the competing demands of stability and progress pointed to an essential compromise,—"a compromise between paradoxes, between certainty and uncertainty, between the literalism that is the exaltation of the written word and the nihilism that is destructive of regularity and order." "The victory," he said, "is not for the partisans of an inflexible logic, nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned." For Justice Cardozo, the distrust of a concept was the beginning of wisdom and he was constantly on guard against the "tyranny of labels." With characteristic detachment, he was aware of the snares of "universals," as well in his study of the "theory of juristic method" as in other matters. "The snares that are thus set may catch the heedless feet of thinkers who have been loud even as they stumbled in cries of danger unto others." And thus he recognized that "Generalizations about the ways in which the judicial process works are quite as likely to be incomplete, and to stand in need of supplement or revision, as the generalizations yielded by the process when in action, the output of its workings."

On the one hand, Justice Cardozo dissented from the "depreciation of order and certainty and rational coherence" as merely negligible goods, and, on the other, he was "wholly one" with the insistence "that the virtues of symmetry and coherence" can be purchased at too high a price and that law is "a means to an end and not an end in itself." He summed up his teaching and his practice in his heed to the warning that principles and rules and concepts are in many instances but "glimpses of reality" and that there is the need, as he put it, of "reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour."

Success in such an effort at interpretation of the social consciousness manifestly would demand a rare equipment of learning, experience and wisdom,—a balance of judgment which imperfect knowledge or narrowness of understanding would at once upset. That necessary equipment Mr. Justice Cardozo possessed in a remarkable degree and with his keen awareness he was able to escape the pitfalls into which a lesser mind might easily have stumbled. Justice Cardozo fully recognized the disagreements among those who had studied the juristic method, whether they prosecuted their studies as detached philosophers or with the aid of experience in the exercise of the judicial function, and in summarizing the conflicting contentions he disclosed his own attitude in these words: "I do not know how it will all end. I know that it has been an interesting time to live in, an interesting time in which to do my little share in translating into law the social and economic forces that throb and clamor for expression. Like any other era of unrest, it has had its pangs of uncertainty, its doubts and hesitation." And referring to a saying of Bacon, he concluded: "The 'wayes' we have to travel nowadays are not flat and plane, if indeed they ever were. They are uphill and downhill with many a signpost that is false and many another that has fallen. . . . If I have not lost the road altogether, if my feet have not sunk in a quagmire of uncoordinated precedents, I owe it not a little to the signposts and the warnings, the barriers and the bridges, which my study of the judicial process has built along the way."[1] It was under the sway of the convictions produced by that special study that he wrought out the judicial opinions which constitute his monument.

Judge Irving Lehman, of the Court of Appeals of New York, has spoken out of his intimate knowledge of the strong influence exerted by Cardozo as Chief Judge of that court. Judge Lehman referred to his vast store of learning, his unflagging industry and his command of the gentle art of persuasion, but far above those he placed the "integrity of his mind," "his complete absorption in his work, his selflessness, his independence restrained by his respect for the opinion of others." These qualities were also outstanding in his work in this Court. In conference, while generally reserved and reticent until it was his duty to speak, he then responded with an unsurpassed clearness and precision in statement. His gentleness and self-restraint, his ineffable charm, combined with his alertness and mental strength, made him a unique personality. With us who had the privilege of daily association there will ever abide the precious memory not only of the work of a great jurist but of companionship with a beautiful spirit, an extraordinary combination of grace and power.

1. Address before New York State Bar Association, 1932. Association Report, Vol. 55.

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THE HOUSE OF DELEGATES MEETS

Early in January the elected representatives of much more than a majority of American lawyers will meet in Chicago, to take counsel together as to the problems of their country and their profession. Several matters of great importance are upon this calendar of the House of Delegates, in addition to routine business; and there has been need of time and opportunity for the House to debate and discuss these matters sufficiently, in order to secure a consensus of deliberative opinion as to them, subject always to the final determination of Association policy by a referendum vote of its members. Mid-summer temperatures and the enforced time schedules of the annual meeting have led to the laying aside of these matters for full discussion at a mid-winter session of the House.

First of all in the need for full debate is the report and recommendations of the Committee on Administrative Law. Lately the recommendations of this important Committee have been "approved in principle," and specific action upon the proposals has been deferred until time could be made available for adequate discussion. The reports and recommendations of this Committee are familiar to members of the Association; they present issues which are indeed vital to free institutions and the administration of justice under law. The American Bar Association has indeed a responsibility for recommendations and leadership in so new and important a field of law. No agency of the Association less representative than the House of Delegates could make acceptably those decisions of policy.

Other vital matters are likely to be debated and acted on by the House at this January session. Ways and means of promoting further improvement in the administration of justice in the State Courts, along the lines formulated last year, will be at the fore. The difficult subject of the Association's "policing" of law lists will require consideration. A report by the Standing Committee on Labor, Employment and Social Security is likely to bring up lively and controversial issues, as the Association considers whether it will make recommendations to improve the processes of adjudication or conciliation of labor disputes.

In some form or other, the House of Delegates is likely to heed the request of strong local Associations that the American Bar Association make it clear that American lawyers, along with other citizens, support staunchly the protests of their government against the brutal overriding of the rights and liberties of the members of religious and racial minorities, including American citizens, in other lands. The deep indignation which is widely felt on this subject has been expressed by local Bar Associations, with a request that the American Bar Association speak out in behalf of the organized profession. Within the limits of the Association's traditional policy as to foreign affairs it seems likely that this vital issue will find its way to the floor during a deliberative and highly significant meeting of the house.

WHAT THE MEMBERS OF A BAR ASSOCIATION HAVE IN COMMON

Many lawyers refuse to join Bar Associations — local, State or National — because of some difference of opinion or feeling of disagreement with the Associations on some matter of opinion which seems important at the time. The vital community of interest and outlook on many matters is disregarded because of the emphasis placed on some single issue or aspect in which the individual feels himself at variance with the views of the majority of those who would be his associates if he became a member.

This individualism and aloofness disregard the fact that membership in the American Bar Association, for example, does not presuppose intellectual approval of everything which the Association votes and says and does. There are many who are active in the ranks of the Association and yet differ with the majority on some issues. They have become mem-

(*Continued on page 39*)

bers because they realize that the many points of common objective are more vital than the few points of disagreement.

For men and all associations of men there is abundant good sense in the declaration which the distinguished English visitor to America, Mr. Anthony Eden, made as to the people of his country. At a time when nations and men are divided and estranged by clashes of philosophies, it may be recognized that Mr. Eden stated brilliantly but simply a point of view which might well be given universal application. Accepted as a philosophy of unity among lawyers in behalf of the common tasks of the profession through Bar organization, it would mark a great step forward. Mr. Eden said:

"It is quite true that we criticize one another sometimes; we have always done so, and I suppose we always shall. In itself this is no unhealthy sign in any free community, but this does not alter the fact that at heart we all want the same thing, we all want to preserve our liberties, we all want freedom and security, not only for ourselves, but for our children and for our children's children. We all want peace, however much we may differ as to the method we think best to follow in order to win the common goal. There is a unity of outlook deeper than all the more superficial disunities of expression. What a Nation has in common is what matters most. The still waters of community of outlook sometimes run so deep that they are less noticeable than the controversial ripples on the surface, but they matter more."

At the turn of the year, American lawyers will do well to heed the fact that "the still waters of community of outlook" "matter more" in the work of Bar Associations than "the controversial ripples on the surface." A united profession involves no surrender of individual opinion upon fundamentals but only a whole-hearted cooperation under a form of organization in which the majority makes decisions from which any member may hold and express freely his personal dissent.

LAWYERS AND LAW LISTS

January first of this year is a significant date for American lawyers, in view of Canon 43 of the Canons of Professional Ethics. This Canon provides that

"It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association."

The Association's Rules and Standards have been "effective as to law lists published, circulated or maintained on or after July 1, 1938" (Rule 4). Through the Association's Special Committee on Law Lists, the preliminary work of investigation has been comprehensively done; and the Committee has gone forward with its task of applying to the ascertained facts as to particular lists the rules and standards which were adopted by the Association at its Kansas City meeting in 1937. Upon the adjournment of the Cleveland meeting in 1938, the Committee made a preliminary report of its approval of various lists. In this issue of the JOURNAL, the Committee makes an extended statement of what it has done and proposes further to do, and sets out the names of some forty-four lists whose 1939 editions it has approved as conforming to such standards as the Association has prescribed. Each such action states—although law list publishers and solicitors may not always mention this—that

"This approval is not an estimate of the productivity or value of the aforementioned publication to subscribers or listees."

Every member of the Association should read carefully the statement submitted by the Committee. That statement indicates the measures that have been taken by the Law Lists Committee of the Association to make available to members and other lawyers reliable information as to the character, standing and business methods of law lists, to ascertain and report which of them are willing to conduct their business in a manner compatible with professional ethics, and to make it possible to distinguish which of the law lists were doing legitimate business and which were exploiting the profession. What has been done thus far has of necessity been preliminary and experimental—by the process of "trial and error." If the standards thus far prescribed are in any respect too lax or too strict, amendments can be adopted on the basis of experience. If the members of the Association do not wish it to undertake the regulation of law lists, that point of view can be made effective. At the present time, the determination of the policy of the Association is in the hands of the House of Delegates; and the whole subject is likely to receive consideration at the January meeting.

When the Association entered this field, there were some 160 law lists which the Committee was able to locate and ask for information. The number of law lists which have survived and are now functioning has at least been greatly reduced, and further decrease in the number of lists seems likely. The 44 lists which have been approved are said to collect from American lawyers more than $1,500,000 a year —six times the total amount of dues paid to the American Bar Association. This sum seems to be a substantial burden on the "overhead" cost of doing law business for clients. Although in the opinion and experience of many lawyers,

the most useful and trustworthy "forwarding list" for lawyers is that provided by the membership roster of the Association and the acquaintance gained at its meetings, the fact remains that large amounts of law business are forwarded on the basis of information obtained in part or wholly from law lists.

In the investigations and preliminary work thus far, the Association has acted on the basis recommended by its predecessor Committee, and has required the law lists which desire to conform to the regulations adopted by the Association, to file their applications and deposit a substantial registration fee to be used by the Association's committee in defraying the clerical, traveling and other expenses incurred in making the examination and determining whether the list shall be approved. Whatever may be said as to the advisability of such a basis during the stage of preliminary investigation, the Committee has raised a question of Association policy as to whether the cost of continued investigation and regulation of the law lists should be paid to the Association by the law lists themselves. If such a supervision of law lists and of the inclusion of lawyers' names therein is deemed to be a proper activity of the Association for the protection of its members and the furtherance of its Canons of Ethics, the question is raised as to whether or not the expenses of such activities should be permitted to be borne by anyone except the members of the Association through the dues paid.

This is one of the important and significant questions of Association policy which will be before the House of Delegates in January.

LAWYERS AND THE BILL OF RIGHTS

At the meeting of the House of Delegates this month, the Association's Committee on the Bill of Rights will present its first report, which will necessarily be of a preliminary character. One hundred and forty-seven years ago on December fifteenth, the Bill of Rights became the great charter of American liberties as a part of the Constitution of the United States. During the intervening years, it has been the high privilege and duty of American lawyers to defend all manner of men and women from the denial or abridgement of their rights of personal freedom and individual property, against arbitrary action by government. Traditionally, the lawyers of America have attained no higher opportunity of distinction and public service than has inhered in the defense of liberties vouchsafed by the Bill of Rights.

During the present year of the Association, this function which has most often been fulfilled by individual lawyers and volunteer groups of lawyers has been given the impetus of the aid and leadership of a representative Committee of the American Bar Association. That Committee has been making careful surveys of claimed infringements of the Bill of Rights, and has been considering what may best be done to make the voice of the organized Bar effective on such issues. As shown elsewhere in this issue, the Committee has already taken practical action in a particular controversy as to freedom of assembly. Its forthcoming report to the House of Delegates should point the way to other effective steps.

No report or action by any body of men, however distinguished, could add to the moving force and deep meaning of the simple words of this charter of liberty, at a time when the brutal denial of rights abroad and the concern lest arbitrary action gain foothold in America have given a new eloquence, even pathos, to the statement of rights which should be kept sacred here.

Fewer than five hundred words present the continuing challenge of America to the concept, wherever held or insidiously urged, that the rights of individuals are subordinate to the strength of government, that men have no rights which majorities are bound to respect, that arbitrary action by government is justified if it serves the wishes of political majorities, and that the collective welfare should be promoted by the State at whatever hazard to the rights of persons. In the face of trends which leave the Tenth Amendment rarely mentioned in constitutional interpretation, the American Bar Association will abundantly justify its existence and will deserve the support of all lawyers and citizens, if through it the organized Bar can make some substantial contribution to the defense and maintenance of the Bill of Rights intact.

Meanwhile every member of the Association should read the brief of the Committee summarized in this issue. A copy of the brief in full can be obtained by request to Association Headquarters.

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

BRINGING LEGAL INSTITUTES TO THE SMALLER LOCAL BARS

Significance of These Enterprises from the Standpoint of Local Lawyers—Procedure That Was Ultimately Found to Be Most Successful and Which Has Been Uniformly Followed — Discussions Made to Center Around the Every-Day Problems of the General Practitioner—Some Advantages Which the Institutes Afford to Practitioner and Public

By Burt J. Thompson

Member of Iowa Bar; Chairman of Committee on Advanced Legal Education, Section of Legal Education and Admissions to Bar

WHEN an average lawyer is given the responsibility of directing the work of a State Bar Organization, he finds things out. This narrative is, therefore, intended as a frank and unvarnished recital of the personal experiences of one of these average lawyers who has had this experience and some of the things he discovered. If it has any justification whatever, it lies in the conviction that a great majority of the rank and file of our profession have too little opportunity to get close enough to the facts of our professional situation to appreciate what is really taking place. It is submitted in the further belief that it may lead the way to an appreciation of not only the need for, but a practical method of, getting together in a somewhat coordinated resistance to the numerous encroachments that are making the practice of law an economic and moral hazard to all who enter.

The writer of this article has practiced law in one of the smaller communities, which make up the urban population of the State of Iowa, for a number of years. Iowa is a state of small communities and has but one city of more than 100,000 population.

In 1936 I was elected Vice-President of our Association and, assuming that the traditions of our Association would be followed, I knew that in a year I would probably be faced with executive responsibility. For the first time in my life, I began to look around and examine the situation our Bar as a profession was in. It was a major and dramatic experience and something that will never be forgotten.

Up to that point, I had been content to do the work that comes into any busy office, to attend the annual conventions of our State Association, to serve on committees, to meet other lawyers at bar meetings, and pay my dues to the State and American Bar Associations.

The American Bar Association was not a vital influence in *my* way of conducting a law office. It was a long time before I discovered the extent or value of the great work that was being done by the army of men in the National Association who were devoting a substantial part of their time to the solution of problems which were affecting our profession as a class.

I soon began to realize that it was important for me to find out something about lawyers as a class; about our profession as a whole; the state of mind of both clients and attorneys; what was producing the unfavorable publicity that was appearing with so much frequency; what was our economic situation in general; and a host of other problems that had never occurred to me.

I knew what *my* problems were but it suddenly dawned on me that I knew little about what the Bar as a class was up against, and so I began to read and inquire and sit up nights in pursuit of answers to questions that piled up rapidly.

It wasn't long until it became apparent that there was a new world to be explored; a new literature to be perused and immediately an entirely new conception of a lawyer's place and responsibility in this topsy-turvy world began to emerge.

It seemed to me that definite currents threatening our profession as a class had set in that I knew nothing about.

As I began to uncover the inroads that were being made by laymen in the field of unauthorized practice; administrative agencies that were taking over entire fields of activity; growing if not unbearable overhead; overcrowding caused by lax standards of admission; unfortunate public relations; concentration of business in the hands of relatively small groups and a host of other related problems, the conviction of the utter helplessness of the individual lawyer to meet or solve any of them took possession of me.

And I thought of the 3000 lawyers in my own State, and the 180,000 in the whole country, a great majority of whom were just average lawyers like myself with no more conception of what was really taking place than I had.

What could be done about it? Was there any reason to believe that *anything* of importance could be accomplished?

I knew that there were approximately 30,000 members of the American Bar Association but I also knew that thousands of them had a very hazy conception of what the complicated machinery of the National Association was turning out or trying to do.

In my own State we had less than half of our Bar in the membership of our State organization, which held a Convention once a year, with about one-fifth of our lawyers in attendance. Further examination disclosed that the organic structure of our Association was almost identical with the original charter created more than 60 years ago and that we were doing as an or-

ganization, the same things, in practically the same way we did them more than half a century ago.

With nearly sixty percent of our lawyers outside of the only professional organization we had, and not interested in or identified with any group activity, the prospect of "getting somewhere" looked anything but encouraging.

We had previously filed an application with our Supreme Court for the adoption of Rules which would integrate our Bar and it looked at that time as though *this* was the way to "get somewhere."

I, therefore, began to drive over the State and preach the gospel wherever any one would listen. In this most informative period, (to me), the fundamental facts about lawyers, their prejudices, their problems and their professional and economic situation began to come to the surface. There was no longer any doubt about the *necessity* of getting together, thinking together and moving out toward some common goal if we were to preserve in the years to come those values which lawyers as a class have contributed to our American way of life. But the resistance to Integration soon demonstrated that even though a majority wanted this all-inclusive (but compulsory) type of organization, we would still be a long way from collective and congenial co-operation and I knew that worthwhile and sound progress toward organized activity depended upon *first* producing a frame of mind that could see and *feel* the value of organized activity.

One other definite fact seemed to be made clear during those first few months of riding and talking and "being told."

There were altogether too many lawyers who felt that they had to "go it alone" or sink; that the Association had given them very little of practical value; very little they could put their finger on as a definite help in "getting" or "doing" more business or that made them better lawyers.

What then could be done to take our Association out into the places where the lawyers lived and worked?

What could we offer them of personal and practical value in their every day practice?

About this time the Annual Convention of the American Bar Association was held at Kansas City. With one other member of our Bar I listened to a discussion of one of the Legal Institutes conducted at Cincinnati or Cleveland. This type of Institute had met with success in several of the large cities where tried. They cost from $300 to $700 and were supported by registration fees. These Institutes are "advanced legal education" pure and simple and intended solely for the benefit of the individual lawyers who attend.

However, this discussion suggested the possibility of trying the same thing in our State, modified in several important respects to meet the limitations incident to small community areas.

It seemed to me that it was fully as important to assist and perpetuate the lawyers of the smaller communities as it was to add further to the equipment and reputations of the lawyers of the larger cities. And it seemed further that if this type of "contribution" could be geared down to fit the machinery of district or local Association we would at once be on the road to building interest and confidence in Association or group activity out where the lawyer lives and struggles with his grocery bills. At the same time we would be making some progress in welding the members of our profession into something like a cohesive group that would be united in a more effective defense of what belongs to it.

In canvassing the situation, we ran into a number of serious problems that are not present in setting up an Institute in a large city where there are from 500 to 1000 lawyers engaged in the practice.

How could it be financed without any money? Where could we secure speakers we could not pay for? How could we get enough lawyers together if we had the speakers? What machinery could be set in motion to handle the details?

There are many other problems, yet the answers were found to all of them. It required several months of examination, experimenting and building, but from the first there was an immediate and favorable response and a disposition to co-operate.

The procedure that was ultimately found to be successful and which we have followed almost uniformly is set out below.

1. We established the State Judicial District as the unit in which to operate. There are 21 in Iowa with from one to nine counties in each.

2. Arrangements were made with six or eight well known lawyers (and law school professors) to discuss propositions of law that had come up in their practice; propositions that are common to all lawyers and in which a majority have an interest. The best lawyers in the State seemed to be waiting to make this contribution without compensation. Having had the proposition in some litigation, it required the minimum of preparation.

3. Presidents of district or local associations (and where there were none we secured them through organizations then and there created—in several instances the first of its kind in the history of the District) were asked to arrange for a meeting at some central point, select the speakers they wanted from the list submitted and invite every lawyer in the District, whether a member of the State or local association or not.

4. The program that proved to be the most successful, is as follows:

a. Meeting convenes at 3:00 P. M.
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Round table discussion.
Adjournment at 5:00.
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In eight months after we started, Institutes were organized and under way in thirteen of our twenty-one

(Continued on page 60)

REVIEW OF RECENT SUPREME COURT DECISIONS

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By Edgar Bronson Tolman*

National Labor Relations Act—Jurisdiction of Board

The power of Congress to regulate labor relations affecting interstate commerce extends to a utility company whose activities are predominantly intra-state but which supplies electric energy to the Federal Government and to numerous parties engaged in interstate and foreign commerce, and the National Labor Relations Board has power to require such utility company to cease and desist from unfair labor practices condemned by the National Labor Relations Act.

An order of the Board, as to matters within its jurisdiction, will not be set aside where the findings on which it rests are supported by substantial evidence, and no violation of procedural due process is shown.

The Board has no power to make punitive orders, and has no authority to invalidate collective bargaining contracts between an employer and independent labor organizations.

Consolidated Edison Company of New York et al. v. National Labor Relations Board et al., 83 *Adv. Op.* 131; 59 Sup. Ct. Rep. 206.

This opinion deals with the validity of an order of the National Labor Relations Board made after the issuance of a complaint by the Board and hearing thereon against the petitioner utility companies. The Board's order was challenged upon four principal grounds: (1) that the Board lacked jurisdiction; (2) that the hearing was unfair; (3) that the evidence was insufficient to sustain the Board's finding as to certain practices; and (4) that it was powerless to direct cancellation of contracts with petitioner Brotherhood and its locals.

The Board issued its complaint against the employers after a charge was filed by the United Electrical and Radio Workers of America, which is affiliated with the Committee for Industrial Organization. The proceedings before the Board resulted in an order directing the employers to desist from certain unfair labor practices found in violation of Section 8 (1) and (3) of the National Labor Relations Act; directed reinstatement of six employees with back pay, and the posting of notices that the companies would desist from the practices in question and that the employees were free to join any labor organization. While the proceedings on this charge and complaint were pending before the Board the employers entered into agreements with the International Brotherhood of Electrical Workers and its local unions affiliated with the American Federation of Labor providing for recognition of the Brotherhood as a collective bargaining agency and containing various stipulations as to hours, working conditions, wages, and for arbitration in cases of disputes. The Board ruled that these contracts were executed under circumstances rendering them invalid and required the employers to desist from giving them effect. The companies petitioned the Circuit Court of Appeals to set aside the order, and the Brotherhood and its locals, who had not been parties before the Board, also petitioned it to set aside the order. The United Electrical and Radio Workers appeared and supported a petition of the Board asking the Court to enforce the order. Upon certiorari the Supreme Court sustained the order in part and set it aside in part. Mr. Chief Justice Hughes delivered the prevailing opinion.

The first ground to the petitioners' challenge to the order was that the petitioners' activities are predominently intrastate, subject to the plenary control of New York and not subject to federal regulation. But this contention was rejected by the Court, which points out that some of the activities of the companies have a direct and important bearing upon interstate and foreign commerce and other matters of federal concern. The opinion notes that these utility companies supply electrical energy to various interstate railroads, to the Holland intertsate vehicular tunnel, to piers for ocean going vessels in New York Harbor, to telephone and telegraph companies for transmitting both interstate and local messages, for trans-Atlantic radio service, to Bennett Air Field, and to the United States Government for lighthouses, post offices, and other federal buildings. Concluding that these phases of the companies' business are matters of federal concern, which warrant federal regulation of their labor relations, Mr. Chief Justice Hughes says:

"It cannot be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly, the terminals and trains of three great interstate railroads would cease to operate;

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"It cannot be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly, the terminals and trains of three great interstate railroads would cease to operate;

*Assisted by James L. Homire and Leland L. Tolman.

interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote.' . . .

"If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal Government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential service to interstate and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

"Congress did not attempt to deal with particular instances. It created for that purpose the National Labor Relations Board. In conferring authority upon that Board, Congress had regard to the limitations of the constitutional grant of federal power. Thus, the 'commerce' contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce. The unfair labor practices which the Act purports to reach are those affecting that commerce. Section 10(a). In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion."

The contention was also made that the State of New York has its own labor relations act which provides adequate regulatory machinery for the companies' labor relations. This contention was rejected also upon the ground that the enactment of the state law could not override the constitutional authority of the Federal Government, and further that there had been no action by the State which had removed the need for the exercise of the federal authority to protect interstate and foreign commerce.

Next in order the opinion discusses the challenge made to the fairness of the hearing, involving procedural due process. Under this heading are discussed amendments of the complaint, the refusal to hear certain witnesses and the transfer of the proceeding from an examiner to the Board itself, and the latter's determination without an intermediate report or opportunity for hearing upon proposed findings. The amendments were made in the course of the hearing and at the close of the evidence a motion was allowed to conform the pleadings to the proof. The Court found no ground for overruling the Board's exercise of its discretion in allowing the amendments.

As to the refusal to hear certain witnesses, the opinion states that the Court of Appeals was correct in its view that the refusal to hear the testimony was unreasonable and arbitrary. But this was found to be no ground for reversal in the present case, for the reason that petitioners had failed to avail themselves of the remedy to apply to the Court of Appeals for leave to adduce additional evidence.

As to the failure of the Board to allow oral argument and the failure of the examiner to file an intermediate report and permit the companies to except to his findings, the Board contended that the petitioners had failed to ask for allowance of these, as contemplated in the rules of the Board. In its refusal to sustain the challenge on the ground of lack of procedural due process, the Court concludes discussion of this feature as follows:

"It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. . . . The points raised as to the lack of procedural due process in this relation cannot be sustained."

Attention was also given to the contention that the Court of Appeals had misconceived its power to review findings, and instead of inquiring whether the findings of the Board were sustained by *"substantial evidence"* it merely considered whether the record was *wholly barren of evidence* to support them. Upon examination of the matter, however, the Supreme Court concluded that the Court of Appeals had intended to apply and did apply the rule that the findings, to be sustained, must be supported by substantial evidence. At this point occasion was taken to observe that while the Act provides that rules of evidence in law and equity are not controlling in proceedings before the Board, nevertheless, mere uncorroborated hearsay does not constitute substantial evidence. On this subject the opinion states:

"The companies urge that the Board received 'remote hearsay' and 'mere rumor'. The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The Court stated further that upon application of the principles it was unable to conclude that the Board's findings as to coercive practice, discrimination, and discharge of employees did not have the requisite factual foundation.

The fourth ground of challenge to the Board's order was sustained. This was that the Board had no authority to require the employers to desist from giving effect to the Brotherhood contracts. The Court states that the findings of the Board and the provisions of its order requiring the companies to desist from carrying out the contracts with the Brotherhood present questions of major importance. These questions are approached in the light of three cardinal considerations: (a) the fact that the Brotherhood and its locals are independent labor organizations affiliated with the American Federation of Labor and are not controlled by the employer companies; (b) the fact that the contracts in question recognize collective bargaining and the Brotherhood as a collective bargaining agency for employees belonging to it and that the Brotherhood agrees not to intimidate or coerce employees into membership and not to solicit membership on the time or properties of the companies; and (c) the fact that the contracts contain important provisions respecting hours, working conditions, wages, sickness, disability, etc., and provide against strikes and lockouts and for the adjustment and arbitration of labor disputes.

The Court observes further that no contention was made that the contracts were unreasonable or oppressive but, on the contrary, that it was virtually conceded that they were fair to employers and employees. It was

noted, moreover, that the evidence showed that the Brotherhood and its locals comprise over 30,000, or 80 per cent. of the employees out of 38,000 eligible for membership. The Brotherhood and its locals contended that they were indispensable parties and that in the absence of legal notice to them or their appearance the Board was without authority to invalidate the contracts. Sustaining this contention the opinion states:

"The Board contests this position, invoking our decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the 'Association' so formed and controlled was not entitled to notice and hearing was made in that relation. . . It had no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. . . The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. . .

"The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hearing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene (Sec. 10(b)) and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' 'relations' with the Brotherhood. But what was thus challenged cannot be regarded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

"The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. . . But this rule assumes that the appellate review does afford opportunity to present all available defenses including lack of proper notice to justify the judgment or order complained of."

The opinion also considers and analyzes the contention that apart from the question of notice to the unions, the Board had no authority to invalidate the contracts because the validity of the contracts was not litigated. This contention also was sustained upon analysis of the record.

The opinion also goes into the very important questions as to the scope of the Board's powers to invalidate contracts with independent labor organizations. It is pointed out that no express authority for this is given to the Board. Nor was any such power found by implication. In analysis of this aspect of the Board's powers, MR. CHIEF JUSTICE HUGHES states that the Board is without punitive jurisdiction, notwithstanding its power to make an affirmative order. In elaboration of this, he states:

"Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c). That section authorizes the Board, when it had found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'. We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra*. Here there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."

In conclusion certain aspects of the contracts with the Brotherhood are emphasized. These aspects include the fact that 80% of the employees having the right to self-organization had joined the Brotherhood; that they had the right to choose the Brotherhood as their representative for their bargaining; and that that right had not been interfered with by the employer; and, furthermore, that the contracts purported to constitute the Brotherhood as the bargaining agency only for employees who were its members.

MR. JUSTICE BUTLER delivered a separate opinion in which MR. JUSTICE MCREYNOLDS concurred. This opinion states the agreement of these two Justices with the Court's decision that the Board was without authority to invalidate the contracts with the Brotherhood. It goes further, however, and urges that the entire order should have been set aside. This view is based upon the facts of record which were thought to show that neither the employers nor the employees are engaged in interstate or foreign commerce, that the employers are engaged solely in intrastate activities and that only a very small percentage of the products furnished to others is by such other parties used in interstate commerce. These facts were urged as establishing a relationship over which Congress has no constitutional power of regulation.

MR. JUSTICE REED delivered a separate opinion concurring in general with the conclusions of the majority opinion, but dissenting from the conclusion that the Board was without authority to require the employers to desist from giving effect to the Brotherhood

contracts. In support of this view the findings of the Board are cited to the effect that the petitioner companies had embarked upon an unlawful course of conduct in order to impose the Brotherhood upon their employees as their bargaining agency, and, at the same time, to discourage and weaken the United Electrical and Radio Workers organization which the employers opposed, and that the contracts were but a consummation and perpetuation of that illegal course of conduct and were part of a systematic violation of the workers' right of self-organization. These and other findings referred to were thought sufficient to warrant the Board in directing that the employers desist from giving effect to the contracts. As to this feature, MR. JUSTICE REED states, in part:

"This determination set in motion the authority of the Board to issue an order to cease and desist from the unfair labor practice and to take 'such affirmative action . . . as will effectuate the policies of this Act.' The evidence was clearly sufficient to support the conclusion of the Board that the Edison companies entered into the contracts as an integral part of a plan for coercion of and interference with the self-organization of their employees. This justified the Board's prohibition against giving effect to the contracts. The 'affirmative action' must be connected with the unfair practices but there could be no question as to the materiality of the contracts. . .

"On the question whether or not the Edison companies' activities as to these contracts were a part of a definite plan to interfere with the right of self-organization, these answers are immaterial. It is suggested that the problem of the contracts should be approached with three cardinal considerations in mind: (1) that one contracting party is an 'independently established' labor organization, free of domination by the employer; (2) that the contracts grant valuable collective bargaining rights; and (3) that they contain provisions for desirable working privileges. Such considerations should affect discretion in shaping the proper remedy. They are negligible in determining the power of the Board. They would, if given weight, permit paternalism to be substituted for self-organization. The findings of the Board, based on substantial evidence, are conclusive. There was evidence of coercion and interference, and the Board did determine that the policies of the Act would be effectuated by requiring the companies to cease giving effect to these contracts."

MR. JUSTICE BLACK concurred in the opinion of MR. JUSTICE REED.

The case was argued by Mr. William L. Ransom for the petitioners in No. 19 and by Mr. Charles Fahy for the National Labor Relations Board. Messrs. Isaac Lobe Strauss and Joseph A. Radway argued the case for petitioners in No. 25 and Mr. Louis B. Boudin for respondent (intervener) United Electrical and Radio Workers of America.

Courts—Jurisdiction—Res Judicata—Corporate Reorganization

Where, in a federal district court, in a corporate reorganization proceeding under Section 77B of the Bankruptcy Act, a question is raised as to the jurisdiction of such court to extinguish the liability of a guarantor of the debtor's bonds, and the court decides such issue and confirms a plan extinguishing the liability and no appeal is taken therefrom, such ruling is res judicata, and is a valid defense to a suit brought in a state court to enforce the guaranty.

Stoll v. Gottlieb, 83 Adv. Op. 116; 59 Sup. Ct. Rep. 134.

The question in this case grew out of a reorganization proceeding brought under Section 77B of the Bankruptcy Act instituted on petition of an Illinois building corporation in the Federal District Court for the Northern District of Illinois. Respondent, Gottlieb, was one of the creditors of the Debtor corporation, and he with other creditors received notice of the petition. The petitioner was a stockholder of the Debtor and had also executed a guaranty on its mortgage bonds.

Later a plan of reorganization was filed calling for cancellation of the bonds and of the petitioner's guaranty thereon. The petitioner and other stockholders filed written acceptances of the plan. After notice to the respondent and hearing, the plan, including a provision for the extinguishing of the guaranty, was confirmed, and it was provided that the plan should be binding on all creditors of the corporation.

Subsequent to the confirmation of the plan the respondent sued the petitioner on his guaranty of three of the bonds in Municipal Court of Chicago. While the municipal court action was pending the respondent petitioned the bankruptcy court to vacate the orders confirming the plan of reorganization and contended before the bankruptcy court that it had no power or jurisdiction to cancel the guaranty. This petition was denied, but no appeal was taken from the order denying the same or from the other orders of the bankruptcy court.

The municipal court entered judgment sustaining the petitioner's liability on the guaranty, notwithstanding the petitioner's plea that the order of the bankruptcy court releasing him from the guaranty and the bankruptcy court's denial of the respondent's petition to set aside the decree confirming the plan where *res judicata*. The Illinois Supreme Court sustained the judgment of the municipal court, but on certiorari it was reversed by the federal Supreme Court in an opinion by MR. JUSTICE REED.

At the outset it is observed that a federal question is involved as to the power of the federal courts to protect litigants before them relying upon rights granted them under the Constitution or other federal law. Inquiry was directed to the conclusiveness of the order releasing the guarantor from liability on the guaranty, assuming that the bankruptcy court did not have jurisdiction of the subject matter of the order which was the release of the guarantor from his guaranty of the debtor's obligations. The Court specifically states that no opinion is expressed as to whether the bankruptcy court did or did not have jurisdiction of the subject matter. The basic reasoning for the conclusion that the plea of *res judicata* should have been sustained is stated as follows by MR. JUSTICE REED:

"A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a Federal court has de-

cided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfatcory than the first."

* *

"We base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is res adjudicata of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional."

In support of its conclusion the Court cites several prior rulings involving similar but not precisely parallel circumstances. *Valley v. Northern Fire Ins. Co.*, 254 U. S. 348, is distinguished.

MR. JUSTICE MCREYNOLDS concurred in the result.

The case was argued by Mr. Albert W. Frochde for the petitioner, and submitted by Mr. David J. Shipman for the respondent.

Taxation—Federal Income Tax—Exemption of Property Received by Inheritance

In determining whether or not property is "acquired by . . . inheritance," within the meaning of the exemption from federal income tax as provided by Section 22(b)(3) of the Revenue Act of 1932, the laws of the several states are not controlling, since the intent of Congress was to provide a uniform rule in establishing such exemption.

Property received by an heir in compromise of his claim as heir under agreement in settlement of a will contest is "acquired by . . . inheritance," within the meaning of the exemption referred to.

Lyeth v. Hoey, 83 Adv. Op. 176; 59 Sup. Ct. Rep. 155.

The question for decision in this case was whether property received by the petitioner from the estate of his grandmother, in compromise of his claim as heir, is taxable as income under the Revenue Act of 1932.

The petitioner and other heirs of the grandmother objected to probate of her will, on the ground of lack of testamentary capacity and undue influence. The probate court of Massachusetts, after a showing of evidence on these questions granted a motion to frame issues for trail before a jury. In this situation a compromise agreement was made between heirs, legatees, devisees, executors of the will and the State Attorney General. Under the compromise, it was agreed that the will should be admitted to probate, that specific and pecuniary bequests to individuals should be enforced, that a large bequest to an endowment trust should be disregarded, that $200,000 should be paid to the heirs and a like amount to the endowment trust, and that the net residue should be equally divided between the trustees of that trust and the heirs.

When a distribution was made, the petitioner, in 1933, received $80.17 in cash and securities valued at $141,484.03. This amount the Commissioner of Internal Revenue treated as income for 1933, and levied a tax of $56,389.65, which petitioner paid with interest. He then sued to recover this sum, after denial of his claim for a refund.

The District Court entered summary judgment for the taxpayer, but the Circuit Court of Appeals reversed. On certiorari the Supreme Court sustained the claim of the taxpayer, in an opinion by MR. CHIEF JUSTICE HUGHES.

The opinion deals with the question whether the amount received is exempt under § 22(b)(3) of the Revenue Act of 1932, which exempts from income tax "The value of property acquired by gift, bequest, devise or inheritance. . . ."

In ruling on the question two aspects of the matter are discussed: (1) whether the state law controls as to the question whether property an heir receives from his ancestor's estate under a compromised will contest is acquired by inheritance or not, and, (2) if not, whether the property so received is acquired by virtue of inheritance within the meaning of the federal income tax exemption.

In deciding the case, MR. CHIEF JUSTICE HUGHES points out that the question is one on which the decisions of state courts are not harmonious, but is one on which Congress evidently intended to prescribe a uniform rule. The conclusion is reached that the state law is not controlling as to whether, in the circumstances, the property received by the heir is acquired by inheritance. After recognizing the state's jurisdiction generally over the probate and administration of estates, the opinion proceeds:

"But when the contestant is an heir and a valid compromise agreement has been made and there is a distribution to the heir from the decedent's estate accordingly, the question whether what the heir has thus received has been 'acquired by inheritance' within the meaning of the federal statute necessarily is a federal question. It is not determined by local characterization.

"In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nation-wide scheme of taxation'. . . Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. . . There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the different views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule."

Attention was then turned to the interpretation to be placed upon the exemption referred to in the Revenue Act. In dealing with this problem the Court, sustaining the petitioner's claim to exemption, emphasizes that he received his share because of his standing as an heir and that the heirship underlay the compromise

and commanded the agreement. Stressing this feature of the case, the Court says:

"There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his claim in that capacity. It does not seem to be questioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status which commanded that agreement and was recognized by it. While the will was admitted to probate, the decree also required the distribution of the estate in accordance with the compromise and, so far as the latter provided for distribution to the heirs, it overrode the will. So far as the will became effective under the agreement it was because of the heirs' consent and release and in consideration of the distribution they received by reason of their being heirs. Respondent agrees that the word 'inheritance' as used in the federal statute is not solely applicable to cases of complete intestacy. The portion of the decedent's property which petitioner obtained under the compromise did not come to him through the testator's will. That portion he obtained because of his heirship and to that extent he took in spite of the will and as in case of intestacy. The fact that petitioner received less than the amount of his claim did not alter its nature or the quality of its recognition through the distribution which he did receive."

The case was argued by Mr. J. M. Richardson Lyeth for the petitioner, and by Assistant Attorney General Morris for the respondent.

Taxation—State Income Tax—Validity of Retroactive Tax on Income Previously Deductible

The Wisconsin Act of 1935 which imposes a tax retroactively on certain dividends received in 1933, which were deductible in computing net taxable income under the general income tax law applicable prior to the Act of 1935, and which taxes such dividends as a special class at different rates of tax and allows different deductions from the rates and deductions applicable in the case of other income, is valid, and is not violative of either the equal protection or due process clauses of the Fourteenth Amendment.

Welch v. Henry et al., 83 Adv. Opp. 99; 59 Sup. Ct. Rep. 121.

This case involves a question whether an act of the legislature of Wisconsin laying an income tax additional to and separate from the general income tax of that State violates the equal protection and due process clauses of the Fourteenth Amendment.

The appellant filed a return and paid a state income tax on his income for the year 1933. Under the then applicable general income tax law of the state, dividends from certain corporations filing tax returns and paying a State income tax were deductible from gross income. In 1935, the legislature found that the State faced a shortage of funds to meet relief payments. To remedy the fiscal situation it adopted an act effective on March 27, 1935. The new act imposed upon dividends received in 1933, which were previously deductible under the general tax law, a graduated tax of one per cent. on the first $2,000 of dividend income, three per cent. on the next $3,000, and seven per cent. on all over $5,000 with no deductions except the sum of $750. The appellant under the 1935 act was required to pay on some $12,000 of dividend income which he had previously been permitted to deduct and was assessed $545.71 as an additional tax for 1933, which he paid under protest and sued to recover. He contended that the additional tax on the 1933 income, imposed by the act enacted in 1935, violated the equal protection and due process clauses of the Fourteenth Amendment.

The Supreme Court of Wisconsin sustained the tax. On appeal the federal Supreme Court, by a divided bench, affirmed the judgment. The prevailing opinion was written by MR. JUSTICE STONE.

Explaining the appellant's contention, apart from the retroactive feature of the tax, MR. JUSTICE STONE observed that it was urged that the disparities in the tax burdens which may result from the different rates and deductions infringe the equal protection clause, because the dividends which the statute selected for taxation as a special class were subjected ratably to a tax burden different from that borne by other types of income for the same year, by reason of the fact that the dividends were taxed at a rate different from that applicable to other income and were allowed the benefit of but a single deduction of $750. Whereas from other types of income specified deductions of interest, taxes, business losses and donations were permitted. In dealing with the contention MR. JUSTICE STONE calls attention to the fact that dividends from corporations deriving a substantial part of their income from local business have been treated as a distinct class for purposes of taxation from the beginning, in various ways; that when in 1935 the legislature sought a further source of taxation it found one class of untaxed income, to-wit, dividends from the specified corporations. In these circumstances the Court found no violation of equal protections and says, in part:

"We think that the selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the Fourteenth Amendment. . . Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its costs among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection. . . Nor iis the tax any more a denial of equal protection because retroactive. If the 1933 dividends differed sufficiently from other classes of income to admit of the taxation, in that year, of one without the other, lapse of time did not remove that difference so as to compel equality of treatment when the income was taxed at a later date. Selection then of he dividends for the new taxation can hardly be thought to be hostile or invidious when the basis of selection is the fact that the taxed income is of the class which has borne no tax burden. The equal protection clause does not preclude the legislature from changing its mind in making an otherwise permissible choice of subjects of taxation. The very fact that the dividends were relieved of tax, when the need for revenue was less, is basis for the legislative judgment that they should bear some of the added burden when the need is greater."

* *

"The bare fact that the present tax is imposed at different rates and with different deductions from those ap-

plied to other types of income does not establish unconstitutionality. It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition."

The remaining portion of the opinion deals with the question whether the retroactivity of the 1935 act laying a tax on income received in 1933 constitutes a taking of property without due process of law. In dealing with this contention it is emphasized that the case differs from those wherein a retroactive tax is laid upon the taxpayer for the performance of some voluntary act which the taxpayer could not reasonably have anticipated as taxable at the time of the act, and that in each case of a retroactive tax the circumstances under which it is levied must be examined before it can be determined that the retroactive application is so harsh and oppressive as to violate constitutional right. Discussing the propriety of levying the tax retroactively and distinguishing cases condemning retroactive taxes on gifts, MR. JUSTICE STONE says:

"Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

"In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. . . Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy. . . In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

"Property taxes and benefit assessments of real estate, retroactively applied are not open to the objection successfully urged in the gift cases. . . Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

"Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here."

In conclusion it is observed that the Supreme Court of Wisconsin recognized that there is a limit to permissible retroactivity. It was thought, however, that the limit had not been exceeded here, because, as the opinion observes "the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income. . . ."

MR. JUSTICE ROBERTS delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred. In this opinion the position was taken that the statute violates the guaranties of both equal protection and due process.

Stating his views that the classification made under the statute is arbitrary and discriminatory, MR. JUSTICE ROBERTS says, in part:

"One must ignore the realities of the situation if he approaches a decision of the case in the light of the equal protection clause as if the statute under attack were prospective in operation; or, in the light of the due process clause, as if the statute were a revision of an existing general income tax system theretofore in force. The illegal discrimination and the arbitrary character of the Act condemn it under the equal protection clause not because it selects a particular class of citizens for the imposition of the tax but because, in so doing, it reaches back and singles out for a new and wholly different sort of income tax those few only to whom a specific deduction was allowed in the general computation of their taxable income for the year 1933. It will not do to examine the classification as if it were the declaration of a new policy of taxation to be operative in the future. No more will it do to separate the retroactive feature of the law and consider it as if it were a mere amendment of a general income tax system as such applicable to all income of all taxpayers subject to the law as it stood at the date of the amendment. The reason for allowing the deduction is plain. As has been said in this Court: 'The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin of the income received by individuals in the form of dividends.' The same thing may be said as to the reason for other allowable deductions, as, for instance, of taxes paid. Reasons of fairness and public policy moved the State to allow the permitted deductions from gross income.

"It readily may be conceded that Wisconsin is, and always has been, free in the imposition of an income tax, for good and sufficient reasons, to treat the recipients of dividends on a basis different from the recipients of other sorts of income. The State also was free to revoke, alter, and amend the provisions for deductions as its views of fairness and policy might dictate. This case presents no such situation. After the taxpayers had returned and paid their tax under the existing system and according to the long established public policy of the State, the State sought additional revenues. Instead of levying an exaction upon the citizens generally or certain classes of citizens, the State went back and sought to tax a small class of income tax payers by reason of the purely arbitrary and adventitious fact that they had been allowed a particular deduction in a past year. It chose as the base of the tax a part of the income of the taxpayer under the law as previously in force. The previously granted deduction was not withdrawn but, on the contrary, the income represented by that deduction was picked out from all others, was classified by itself and taxed in a manner wholly unrelated to the income and the taxes of the recipient of these dividends under the general law which he had computed and paid his tax."

MR. JUSTICE ROBERTS also sets forth in the opinion his reasons for believing that the retroactivity of the tax is violative of the due process clause.

This case was argued by Mr. John M. Campbell for the appellant, and by Messrs. Leo E. Vandreuil and Harold H. Persons for the appellee.

Constitutional Law—Equal Protection

Where a state has established a law school to which its white citizens are admitted, if otherwise duly qualified, it is a violation of the equal protection clause of the Fourteenth Amendment to deny admission thereto to a negro citizen of the state solely because of his race, where he is otherwise qualified for admission.

The denial of equal protection is not relieved by a legislative declaration of policy to provide equal educational facilities in a separate state institution for negroes, until the plan has been carried into effect, nor is it relieved by providing for attendance of the negro citizens of such state in the law schools of adjacent states which are open to negroes.

If equivalent educational facilities are actually extended, the policy of the state to afford them to whites and negroes in separate schools, is not condemned.

Missouri ex rel. Gaines v. University of Missouri, 83 Adv. Op. 207; 59 Sup. Ct. Rep. 232.

This case involves the right of a negro to obtain admission to the School of Law of the University of Missouri, to which the petitioner was refused admission. Asserting that such refusal constituted a denial by the State of equal protection of the law contrary to the Fourteenth Amendment he sued for mandamus to compel admissoin. The State Supreme Court affirmed a judgment denying relief. On certiorari this was reversed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES.

It appears that petitioner is a negro citizen of Missouri; that he had received a degree of Bachelor of Arts from Lincoln University, a state institution for the higher education of negroes, which has no law school. When the petitioner applied to the University of Missouri Law School the registrar advised him to communicate with the president of Lincoln University, and the latter called his attention to provisions of Section 9622 of the Revised Statutes of Missouri which are to the effect that pending full development of Lincoln University, the curators shall have authority to arrange for the attendance of negro residents of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, but which are not taught at Lincoln University, and to pay reasonable tuition fees for such attendance. The section also empowers the curators to open any necessary school or department whenever they deem it advisable. In view of this the petitioner was advised to apply for aid under that section. It was admitted at the trial that the petitioner's degree from Lincoln University would qualify him for admission to the Law School of the University of Missouri, if he were otherwise eligible. His admission was refused upon the grounds that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri." It also appears that the state universities of Kansas, Nebraska, Iowa and Illinois maintain law schools admitting nonresident negroes. In reaching a decision the Court observes that it is manifest that the discrimination would constitute a denial of equal protection, if not relieved by provisions authorizing the curators of Lincoln University to provide additional courses or by the provision made to render aid to negroes to enable them to enter the law schools of adjacent states.

An examination of these provisions was found not to relieve the discrimination. As to the first ground the Court states that although Missouri has given a legislative declaration of purpose to establish a law school for negroes, whenever necessary or practicable, such purpose has not yet been fulfilled and consequently is not enough. As to this MR. CHIEF JUSTICE HUGHES says, in part:

"As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school; that this 'agency of the State,' to which he should have applied, was 'specifically charged with the mandatory duty to furnish him what he seeks'. We do not read the opinion of the Supreme Court as construing the state statute to impose such a 'mandatory duty' as the argument seems to assert. The state court quoted the language of Section 9618, R. S. Mo. 1929, set forth in the margin, making it the mandatory duty of the board of curators to establish a law school in Lincoln University 'whenever necessary and practicable in their opinion'. This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute."

The provision for aid to negro residents of Missouri in obtaining a legal education in adjacent states was also found insufficient to relieve the denial of equal protection. Dealing with this phase of the case the opinion continues:

"The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privileges which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

"The equal protection of the laws is 'a pledge of the protection of equal laws'. . . Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdicion. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which can be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because

it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it."

* *

"Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

MR. JUSTICE MCREYNOLDS delivered a separate opinion expressing the view that the judgment of the Supreme Court of Missouri should have been affirmed. This opinion emphasizes that the education of people in public schools is a matter of local concern which should not be interfered with by federal authority except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. Denying that there has been such disregard of rights, the opinion states:

"For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. Whether by some other course it may be possible for her to avoid condemnation is matter for conjecture.

"The State has offered to provide the negro petitioner opportunity for study of the law—if perchance that is the thing really desired—by paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circumstances is enough to satisfy any reasonable demand for specialized training. It appears that never before has a negro applied for admission to the Law School and none has ever asked that Lincoln University provide legal instruction.

"The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience.

"This proceeding commenced in April, 1936. Petitioner then twenty-four years old asked mandamus to compel his admission to the University in September, 1936, notwithstanding plain legislative inhibition. Mandamus is not a writ of right but is granted only in the court's discretion upon consideration of all the circumstances. . .

"The Supreme Court of Missouri did not consider the propriety of granting the writ under the theory of the law now accepted here. That, of course, will be matter open for its consideration upon return of the cause."

MR. JUSTICE BUTLER concurred in the views expressed by MR. JUSTICE MCREYNOLDS.

The case was argued by Messrs. Charles H. Houston and Sidney R. Redmond for the petitioner, and by Messrs. William S. Hogsett and Fred L. Williams for the respondent.

Railroads—Jurisdiction of Interstate Commerce Commission to Determine Status under Railway Labor Act—Judicial Review of Administrative Findings

Under the Railway Labor Act, the Interstate Commerce Commission has power, upon request of the Mediation Board, to determine, after hearing, whether an electric railway falls within the exception which makes that Act inapplicable to an interurban electric railway not operated as a general steam system of transportation.

The determination of such question by the Commission is binding on the carrier and the Mediation Board, if supported by evidence after a fair hearing.

Such determination is not subject to review under the Urgent Deficiencies Act, but may be reviewed by appropriate proceedings in equity.

Shields v. Utah Idaho Central R.R. Co., 83 Adv. Op. 170; 59 Sup. Ct. Rep. 160.

This case arose on the petition of the Mediation Board to determine whether or not the respondent railroad company is subject to the Railway Labor Act. That Act excepts an interurban railway unless it is operating as a part of a general steam system of transportation. The Interstate Commerce Commission is authorized and directed upon request of the Board to determine "after hearing whether any line operated by electric power" falls within the exception.

On the request of the Mediation Board the Commission, after hearing, determined that the lines of the respondent did not constitute an interurban electric railroad. The Board then ordered the carrier to post a notice prescribed by the Railway Labor Act which the carrier failed to obey. Such failure subjects the carrier to criminal penalties. Consequently, the carrier brought a suit in equity in a federal court to restrain the federal authorities from prosecuting it for the alleged violation. The District Court tried *de novo* the question whether the carrier was within the exception to the Railway Labor Act, reached the conclusion that it was, and granted a permanent injunction. This ruling the Circuit Court of Appeals affirmed. On certiorari, the decree was reversed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES, directing that the complaint be dismissed.

In approaching the question for decision the Court points out that Congress has power to determine what exceptions shall be made to the Railway Labor Act and can make such determination with the aid of an administrative agency. It is observed also that while the term "interurban" is not defined in the statute, it is a permissible delegation of power to leave to the Commission the determination of whether a particular carrier is, or is not, an interurban electric railway.

The question as to what effect shall be given the Commission's determination was then adverted to. The intention of Congress was declared to be the controlling consideration as to this aspect, and an analysis of the statute to determine such intent led to the conclusion that the Commission's determination was binding upon both the carrier and the Mediation Board. In this connection MR. CHIEF JUSTICE HUGHES states:

"In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to *'determine'*. The Commission must determine *'after hearing'*. The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts'. The 'hearing' is 'the hearing of evidence and argument'. . . And the manifest purpose in requiring a hearing is to comply with the

requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. . . The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it; neither could the carrier."

The opinion next discusses whether the determination of the Commission is subject to judicial review and whether it was proper to invoke the power of a court of equity to restrain prosecution in the instant case. In dealing with this Court, while recognizing that the Commission's determination is not "an order" reviewable under the Urgent Deficiencies Act, states that it is, nevertheless, of such a nature as to make judicial review appropriate. In view of the penalties to which the carrier is subjected for failure to comply with an order of the Mediation Board, and in view of the peculiar difficulties which confront the carrier under congressional legislation, (subjecting it to the National Labor Relations Act if it is not under the Railway Labor Act) and its status under the Railroad Retirement Act of 1937, the Carriers' Taxing Act of 1937, and the Railroad Unemployment Insurance Act of 1937, the Court was of the opinion that equitable relief was available to review the Commission's finding.

The question finally considered in the opinion relates to the scope of judicial review of the finding. In dealing with this, it is first noted that there was no constitutional question as to the right of the trial *de novo* to determine the character of the respondent, and no question but that the Commission held a proper hearing and received and considered the evidence. The only question found necessary to consider was whether the Commission had departed from applicable rules of law and whether its finding was supported by substantial evidence or was arbitrary or capricious. Upon an analysis of the evidence the finding was found to have been supported by substantial evidence and free from other objections raised. Stating its conclusion as to the propriety of the order, the Court says:

"It cannot be said upon this evidence, and the related facts summarized in the Commission's report, that the Commission's determination lacked support or was arbitrary or capricious. Nor is there ground for holding that the Commission in reaching its determination departed from applicable principles of law. There is no principle of law which required such a carrier to be classified as an interurban railway. Failing in its effort to obtain a clarifying definition from Congress, the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads."

MR. JUSTICE BLACK concurred in the result.

The case was argued by Solicitor General Jackson for the petitioner, and by Messrs. J. A. Howell and Robert E. Quirk for the respondent.

Taxation—Income Tax—Deduction of Losses on Corporate Stock Through Liquidation

Under the Federal Revenue Acts of 1928 and 1932 imposing income taxes, losses sustained by a stockholder, upon the complete liquidation of a corporation in which stock is held, are not deductible in full as ordinary losses from gross income, but are capital losses, and are to be treated in like manner as losses sustained upon the sale or other disposition of property.

White et al v. United States, 83 *Adv. Op.* 152; 59 *Sup. Ct. Rep.* 179. *Helvering v. Chester N. Weaver Co.*, 83 Adv. Op. 158; 59 Sup. Ct. Rep. 185.

These cases involve questions as to whether under the Revenue Acts of 1928 and 1932 stockholders' losses from their investments in corporate stock are ordinary losses deductible in full from gross income, or capital losses of which only 12½% is deductible from the taxes as computed without regard to such losses.

In the White case, Nos. 96 and 97, the decedents held shares of stock in a corporation and upon its liquidation, more than two years later, the total liquidating dividends amounted to less than the cost of investment. In the tax returns the losses were deducted from gross income. The Commissioner ruled that the losses were capital net losses of which only 12½% were deductible as provided by §101 of the Revenue Act of 1928 and he accordingly found deficiencies which the petitioners paid. The petitioners then sued in the Court of Claims to recover the deficiency payments as overpayments, but recovery was denied. On certiorari the judgment was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE. MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS dissented.

The opinion embraces an analysis of the interrelating provisions of §§ 23, 101, 115(c) and §§ 12, 21 and 22, as well as a discussion of the legislative history of §§ 101 and 115. Consideration of the terms of the statute and the legislative history of the pertinent provisions led to the conclusion that the stockholders' losses on stock held more than two years are capital losses of which but 12½% is deductible from the tax computed without reference to such losses, and are to be treated as are losses upon sales and exchanges of property under §§ 101 and 115(c) of the Act of 1928, and not as ordinary losses deductible in full from gross income under § 23(e).

Emphasis is placed upon Article 625 of Treasury Regulations 74, which interprets §§ 101 and 115(c) of the 1928 Act. These regulations were thought to constitute a clear recognition that §§ 115 and 101 when considered with other sections are interdependent and require stockholders' gains upon liquidation to be taxed as analogous gains on sales of property. The reenactment of §§ 101 and 115 (c) as they appear in the Acts of 1924, 1928 and 1932 is characterized as:

"A Congressional adoption of the regulation as correctly interpreting those sections and is Congressional recognition that Sections 101 and 115(c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed. The method, in the case of stock held for more than two years, is that applied by Section 101 to capital gains and losses from the sale or exchange of property."

In concluding his opinion MR. JUSTICE STONE points out that the rule that all doubts must be resolved in favor of the taxpayer is not applicable to a case when the doubts as to the questioned provisions disappear when read with every other material part of the statute and in the light of their legislative history. In this connection he says:

"We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more

than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be. Here doubts which may arise upon a cursory examination of Sections 101 and 115 disappear when they are read, as they must be, with every other material part of the statute . . . and in the light of their legislative history. Moreover, every deduction from gross income is allowed as a matter of legislative grace, and 'only as there is clear provision therefor can any particular deduction be allowed . . . a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.'"

In the Weaver case, No. 304, the liquidating dividends involved were received by a corporation upon stock which had been held by it in another corporation for less than two years. The applicable revenue act here involved was that of 1932, and the question was whether § 23(f) permitting deductions by corporations of losses sustained during the taxable year is applicable, or whether the limitation thereon imposed by subsection (r) (1) applies. Subsection (r) (1) declares that "Losses from sales or exchanges of stocks and bonds . . . which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges . . ." Section 101 defines "capital assets" as meaning property held by the taxpayer for more than two years.

The Court observes that the scheme of the 1932 Act, with respect to treatment of gains and losses from the exchange or sale of property upon a basis different from other types of gains or losses, is substantially that of the 1928 Act, considered in the White case. The conclusion is reached that the extent to which the taxpayer can deduct the losses is controlled by § 23(r) (1). Since the stock here was held less than two years and there were no gains against which losses could be offset, the loss was not deductible from gross income.

White vs. United States was argued by Mr. John P. Ohl for the petitioners, and by Mr. Edward J. Ennis for the respondent. Helvering vs. Chester N. Weaver Co. was argued by Edward J. Ennis for petitioner and S. E. Graupner for respondent.

Summaries

Insurance—Rehabilitation—Constitutional Law—Due Process; Impairment of Contract

Neblett et al. v. Carpenter, Jr., et al., 83 Adv. Op. 193; 59 Sup. Ct. Rep. 170. (No. 20, decided December 5, 1938.)

Certiorari to determine whether a plan of rehabilitation for the Pacific Mutual Life Insurance Company approved by the state court under the state insurance code, and upheld in decision of the Supreme Court of California, violates "due process" clause or impairs the obligation of contracts. Under the plan, the state Insurance Commissioner was appointed conservator to form a new corporation, all of whose capital stock he would purchase, to take over the assets of the old company. The new company was to assume the policies and obligations of the old, and policy holders were to have an option to take insurance from the new company or to prove their claims for breach of contract, payment of these claims to be made by covenants of the new company and retained assets of the old.

The Court's opinion by MR. JUSTICE ROBERTS finds that the policy holders do not show from the record that they will not receive as much in liquidation of their claims for breach of contract as they would upon sale of assets and distribution of the proceeds and that they have no constitutional right under the due process clause to any particular remedy. It concludes that the option to claim for breach of contract instead of accepting new possibly less favorable policies from the new companies, prevents the plan from being an unconstitutional impairment of contract.

MR. JUSTICE REED took no part in the case.

The case was argued on October 18, 1938, by Mr. William H. Neblett for petitioners and by Mr. William Marshall Bullitt and Miss Hester W. Webb for respondents.

Interstate Commerce—Federal Motor Carrier Act

McDonald v. Thompson, 83 Adv. Op. 168; 59 Sup. Ct. Rep. 176. (No. 55, decided December 5, 1938.)

Certiorari to determine questions of the applicability of § 206(a) of the Federal Motor Carrier Act of 1935 to an interstate motor carrier which had been refused a certificate of convenience and necessity to use the highway of Texas under the state motor truck law. § 206(a) provides that any common carrier "in bona fide operation" as such on June 1, 1935, is entitled to a certificate of public convenience and necessity from the Federal Interstate Commerce Commission without further proof; and the carrier claimed to be entitled to such a certificate, irrespective of the state's action.

The Court's opinion by MR. JUSTICE BUTLER holds that this provision of the Federal Act is not applicable to this carrier, since his inability to comply with the requirements of the Texas motor truck law exclude his activities from the category of "bona fide operation" under the Federal law.

The case was argued on November 8th and 9th, 1938, by Mr. Lloyd E. Price and Mr. T. S. Christopher for petitioner and by Mr. William McCraw and Mr. Albert G. Walker for respondents.

Criminal Law—Unreasonable Search—Informers

Scher et al. v. United States, 83 Adv. Op. 181; 59 Sup. Ct. Rep. 174. (No. 49, decided December 5, 1938.)

Certiorari to review a conviction under § 201, Title II of the Liquor Taxing Act of 1934. The errors assigned related to the admissibility of evidence as to the source of information leading to the arrest and to the validity of the search which led to the arrest.

The Court's opinion by MR. JUSTICE MCREYNOLDS holds the sources of information leading to the arrest were unimportant to petitioners' defense, and that the evidence was, therefore, properly excluded, particularly in view of the public policy which forbids disclosure of an informer's identity except in unusual circumstances.

The opinion also holds that the search leading to the arrest was not unreasonable or oppressive.

The case was argued on November 7, 1938, by Mr. Gerald A. Doyle for petitioner and by Mr. Alexander Holtzoff for respondent.

Equity—Irreparable Injury—Railroad Retirement Act—Carriers Taxing Act

California v. Latimer et al., 83 Adv. Op. 164; 59 Sup. Ct. Rep. 166. (No. 13, original, decided December 5, 1938.)

In an original action by the state to enjoin enforcement against the State Belt Railroad operated by

the State of California along the San Francisco water front, of the Federal Railroad Retirement Acts of 1935 and 1937, and the Carriers Taxing Act of 1937, the Court held, in an opinion by MR. JUSTICE BRANDEIS, that no danger of irreparable injury was shown. The alleged threats that the Railroad Retirement Board would require the State Belt Railroad to keep records of its employees and that the Carriers Taxing Act would require payment of taxes which would be refunded if the Act should be inapplicable, were both examined and held to be unsubstantial. The bill was, therefore, dismissed for want of equity.

The case was argued on November 7, 1938, by Mr. Warner W. Gardner for defendants and by Mr. Lucas E. Kilkenny for complainant.

Territories—Power of Legislative Taxation—Due Process—Interstate Commerce

Inter-Island Steam Navigation Co. v. Hawaii, 83 Adv. Op. 198; 59 Sup. Ct. Rep. 202. (No. 94, decided December 5, 1938.)

Certiorari to determine the validity of an act of the legislature of Territory of Hawaii which authorized a Territorial Public Utilities Commission to investigate generally the business conduct of public utilities doing business in the Territory and then to effect the necessary relief to correct unsatisfactory conditions by proceedings before the Interstate Commerce Commission, or before any court. The statute also levied a tax on all utilities subject to investigation to cover the expense of administering the Act. The Act had been ratified and extended by Congress. The petitioner here, a local common carrier taking shipments between points in the Territory, challenged the Territorial Commission's jurisdiction over it on the ground that the Shipping Act of 1916 (39 Stat. 728) superseded the Territorial Act. This contention, the Court's opinion by MR. JUSTICE BLACK rejects, since the Shipping Act does not show any intention of Congress to withdraw all jurisdiction from the Territory over water carriers.

The company also argued that the taxes were a burden on interstate commerce. The opinion refutes this upon the ground that Congress had itself ratified the Territorial Act.

The Company's final contention that the tax violates the Fifth Amendment since it is levied against petitioner although no actual investigation of petitioner had been made by the Commission is rejected on the ground that a general tax need not be apportioned in accordance with services actually performed.

The case was argued on November 18, 1938, by Mr. J. Garner Anthony for petitioner and by Mr. Julius Russell Cades for respondent.

Trademarks—Unfair Competition—Statutes—Jurisdiction of United States District Court

Armstrong Paint and Varnish Works v. Nu-Enamel Corp. et al., 83 Adv. Op. 183; 59 Sup. Ct. Rep. 191. (No. 51, decided December 5, 1938.)

Certiorari to review questions arising under the trade mark laws of 1905 and 1920 as applied in an action to enjoin the use of the words "Nu-Beauty Enamel" by the defendant, as an infringement of plaintiff's registered trade mark "Nu-Enamel" and as unfair competition. The district court had found that the name was merely descriptive and, therefore, not valid as a trade mark and refused jurisdiction of unfair competition.

The Supreme Court's opinion by MR. JUSTICE REED holds both of these rulings to be error. It determines that a finding of invalidity of a trade mark would not on that account divest the Federal court of jurisdiction of the merits on the ground of unfair competition at common law, since both a suit for infringement based on violation of a registered trade mark and one for unfair competition rest upon substantially the same facts, and since registration under the trade mark acts had furnished a substantial ground for federal jurisdiction that jurisdiction continues for the purpose of determining on the same facts, the issue of unfair competition.

The opinion also finds upon examination of the purposes and language of the 1905 and 1920 Act that to hold a descriptive trade mark such as this non-registerable under that Act would be to cause a glaringly absurd result, and therefore concludes that the name "Nu-Enamel" although descriptive, is registerable under the 1920 Act and that the registrant is entitled to recover both for infringement of trade mark and, under the allegations of the bill, for unfair competition at common law.

The case was argued on November 7th and 8th, 1938, by Mr. Moses Levitan and Mr. George I. Haight for petitioner and by Mr. Edwards S. Rogers for respondents.

Federal Income Tax—Income Defined

M. E. Blatt Co. v. United States, 83 Adv. Op. 159; 59 Sup. Ct. Rep. 186. (No. 98, decided December 5, 1938.)

Certiorari involving the taxability as income of the value of improvements made on leased property by the lessee. The taxpayer had leased a theatre for ten years and the lessee had agreed to make certain improvements on the property which were to become the property of the lessor at the expiration of the lease. The Commissioner of Internal Revenue computed the first year's income from these improvements at one-tenth of their depreciated value which he calculated at a percentage of the cost.

The Court's opinion by MR. JUSTICE BUTLER holds that the findings of the district court do not show that this improvement was rent and thus taxable as income; and that the improvements even if they increased the value were not realized income at the time of the assessment.

The opinion further holds that the method used by the Commissioner in computing the income does not show income assignable to the year of installation.

MR. JUSTICE STONE filed a separate short opinion in which he agreed with the majority that the finding below failed to establish that the increase resulted in an increase in market value in the taxable year and he, therefore, deemed it unnecessary to decide whether such an increase, if established, would constitute taxable income of the lessor.

The case was argued on November 15th and 16th, 1938, by Mr. Lawrence Cake for petitioner and by Mr. J. Louis Monarch for respondent.

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS VI, VII, VIII AND IX ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 1—Scope of Rules

The Jessup & Moore Paper Co. v. West Virginia Pulp and Paper Company and Krafelt Corporation of America. (District of Delaware, NIELDS, D. J., Dec. 1, 1938).

The provision of Rule 1 that the Rules should be construed to secure the just, speedy and inexpensive determination of actions, does not authorize the use of a bill of particulars to secure disclosure of proof to amplify pleading.

RULE 2—One Form of Action

Marie Catanzaritti, et al v. Lina Bianco. (Middle District of Pennsylvania, WATSON, D. J., Nov. 28, 1938).

The existence of an adequate remedy at law is not ground for dismissal of an action begun as a suit in equity before effective date of Rules but which came on for hearing on a motion to dismiss after September 16, 1938.

RULE 3—Commencement of Action

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

Rule 3 relating to commencement of actions and Rule 4 (d) (4) relating to service upon the United States supplant the provisions of the Tucker Act (Sections 5 and 6 of the Act of March 3, 1887; 24 Stat. 506; U. S. C., Title 28, Secs. 762 and 763).

RULE 4—Subdivision (d)—Summons; Personal Service

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

Rule 3 relating to commencement of actions and Rule 4 (d) (4) relating to service upon the United States supplant the provisions of the Tucker Act (Sections 5 and 6 of the Act of March 3, 1887, 24 Stat. 506; U. S. C., Title 28, Secs. 762 and 763).

RULE 7, Subdivision (c)—Demurrers, Pleas, etc., Abolished

Shell Petroleum Corporation v. Paul O. Stueve. (District of Minnesota, SULLIVAN, D. J., Dec. 12, 1938.

1. Demurrer filed prior to the effective date of the Rules, attacking the sufficiency of a counterclaim, should be treated as a motion for a more definite statement of claim. (Rule 7 (c))

2. Although a party may set forth two or more claims alternatively and hypothetically, and as many claims as he has regardless of consistency, and may demand relief in the alternative, he must, nevertheless, comply with the provisions of Rule 8 (a) (2) that the pleading must contain a short, simple and plain statement of the claim. (Rule 8 (a) (2))

3. The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the Rules, unless their application would not be feasible or would work injustice. (Rules 81 (c) and 86)

(EDITORIAL NOTE. The question as to what should be done with demurrers, in view of their abolition by the new Rules, has been variously dealt with. In *New York Life Insurance Co.* v. *Coldiron* (W. Wash., October 6, 1938) a demurrer was stricken (Bulletin No. 2). In that case, however, it did not appear whether the demurrer was filed prior or subsequently to the effective date of the Rules. In *Ashman* v. *Coleman* (W. Pa., October 24, 1938) a demurrer was treated as a motion to dismiss, for failure to state a claim (Bulletin No. 2). In the case under discussion—*Shell Petroleum Corporation* v. *Stueve*—a demurrer was treated as a motion for a more definite statement of the claim.)

Shell Petroleum Corporation v. Paul O. Stueve. (District of Minnesota, SULLIVAN, D. J., Dec. 12, 1938.)

Although a party may set forth two or more claims alternatively and hypothetically, and as many claims as he has regardless of consistency, and may demand relief in the alternative, he must, nevertheless, comply with the provisions of Rule 8 (a) (2) that the pleading must contain a short, simple and plain statement of the claim.

Joseph D. Rosenberg v. Hano & Company, et al. (Eastern District of Pennsylvania, DICKINSON, D. J., Dec. 6, 1938.)

1. Objections to the complaint on the grounds that it does not state a cause of action, that the action was not brought within the time prescribed by the Act upon which based and that the statement of the claim is defective because of vagueness, should be raised by motion and not by entering a rule. However, as defendant had obtained such a rule, it should be treated as a motion. (Rule 12 (b))

2. Determination of question of sufficiency of complaint which is presented on motion may be deferred until the trial. (Rule 12) (d))

Daniel C. Mulloney v. Federal Reserve Bank of Boston, et al. (District of Massachusetts, BREWSTER, D. J., Dec. 5, 1938.)

1. In an action for conspiracy to cause the failure of a bank, plaintiff may be directed to furnish bill of particulars, naming specific defendants or their agents who participated in the wrongful acts; specifying times and places of events alleged; and naming persons to whom defamatory statements were made, in spite of the

fact that the last mentioned item may incidentally involve a disclosure of witnesses. (Rule 12 (e))

2. Plaintiff in an action for conspiracy should be required, on defendants' motion for further particulars, to specify whether alleged defamatory statements were oral or in writing, and, if the latter, to attach copies of the writings, since such discovery may be had under Rule 34, providing for the production of documents, etc., for inspection. (Rule 12 (e))

RULE 8—Subdivision (a)—Claims for Relief

H. B. Watters v. The Ralston Coal Company. (Middle District of Pennsylvania, JOHNSON, D. J.)

An allegation in a complaint that "The plaintiff is an individual, and a citizen of the United States, and a citizen of the State of Ohio, and is domiciled in the State of Ohio" was considered a sufficient allegation of citizenship to support jurisdiction on the ground of diversity of citizenship.

Subdivision (e)—Pleadings to Be Concise and Direct; Consistency

Marie Catanzaritte, et al v. Lina Bianco. (Middle District of Pennsylvania, WATSON, D. J., Nov. 28, 1938).

1. A pleading which contains many evidentiary allegations and inconsistent allegations not properly separated does not meet the requirement that pleadings shall be simple, concise and direct, and should be stricken off. (Rule 8 (e) (1))

2. Claim in the nature of ejectment and a claim to impress a trust may be joined alternatively in spite of the fact that they may be inconsistent. (Rule 8 (e) (2))

3. Whether the plaintiff is entitled to the specific relief for which he asks, will not be considered on a motion to dismiss the complaint for insufficiency. (Rule 54 (c))

4. The existence of an adequate remedy at law is not ground for dismissal of an action begun as a suit in equity before effective date of Rules but which came on for hearing on a motion to dismiss after September 16, 1938. (Rules 2 and 86)

Frank E. Borton v. Connecticut General Life Insurance Company. (District of Nebraska, DONOHOE, D. J., Nov. 28, 1938).

1. The plaintiff may, if he elects, ask for relief in the alternative. (Rule 8 (e) (2))

2. Federal Rules of Civil Procedure govern all procedure after removal in civil actions removed to the District Court from a State court. (Rule 81 (c))

3. An amendment to a complaint in order to pray for alternative relief is not indispensable in view of Rule 54 (c) which provides for granting the relief to which a party is entitled even if he has not demanded it. (Rule 54 (c))

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

The fact that a counterclaim and a third party claim interposed by the same defendant are inconsistent with each other, is no objection to bringing in the third-party defendant.

RULE 12—Subdivision (b)—Defenses and Objections, How Presented

William M. Knecht v. Castleman River Railroad Company. (Western District of Pennsylvania, SCHOONMAKER, D. J., Nov. 16, 1938).

In a case in which argument was had subsequently to September 16, 1938, on an affidavit of defense filed prior to that date under the Pennsylvania Practice Act, such affidavit should be treated as equivalent of a motion to dismiss under the new Rules. (Rule 86)

Subdivision (e)—Motion for More Definite Statement or for Bill of Particulars

Martin Sierocinski v. E. I. Du Pont De Nemours & Company. (Eastern District of Pennsylvania, KALODNER, D. J., Nov. 10, 1938).

An allegation that the explosion of a dynamite cap was caused solely by the defendant's carelessness and negligence in manufacturing and distributing held not sufficiently specific, and defendant's motion for a more definite statement of claim should be granted. (Rule 12 (e))

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

A motion to strike an answer for failure to comply with a demand for a bill of particulars will be denied on condition that the defendant supply all of the particulars of which he has knowledge.

The Jessup & Moore Paper Co. v. West Virginia Pulp and Paper Company and Krafelt Corporation of America. (District of Delaware, NIELDS, D. J., Dec. 1, 1938).

1. Defendant in a patent suit moved for a bill of particulars specifying what plaintiff deemed to be patentable in respect of each claim of the patent; specifying the minimum and maximum strength of a chemical named in the claims; and specifying acts which plaintiff contended constituted "authorizing, inducing" etc. of infringement by one defendant on the part of the co-defendant. *Held,* the motion should be denied because the particulars would require either a judicial construction of the claims of the patent or the production of proof. (Rule 12 (e))

2. The provision of Rule 1 that the Rules should be construed to secure the just, speedy and inexpensive determination of actions, does not authorize the use of a bill of particulars to secure disclosure of proof to amplify pleading. (Rule 1)

[EDITORIAL NOTE: While denying the motion for a bill of particulars, the court intimates that the desired relief may be obtained by interrogatories under Rule 33. Presumably it can also be obtained by taking the deposition of some officer of the plaintiff corporation under Rule 26. As the effect of furnishing the information requested would be to narrow the issues to be litigated at the trial, it would seem to be within the intendment of the new procedure that the information be supplied before the trial in some one of the modes provided by the Rules. In *American LaFrance-Foamite Corporation v. American Oil Co.* decided in the District of Massachusetts on October 27, 1938, (Bulletin No. 3), a somewhat similar disclosure was obtained by a bill of particulars.]

RULE 13—Subdivision (a)—Compulsory Counterclaims

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

1. In an action brought by a subcontractor in the name of the United States against the surety on a gen-

eral contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over.

2. When a counterclaim arises out of the same transaction as the main action, it must be set up and the court has jurisdiction even though it would not have had jurisdiction if the counterclaim were set forth in an independent suit.

RULE 14—Subdivision (a)—When Defendant May Bring in Third Party

Indie E. Seemer v. Ernest R. Ritter (Middle District of Pennsylvania, WATSON, D. J., Nov. 28, 1938).

In an action for personal injuries resulting from an automobile accident, defendant's motion for leave to serve a summons and complaint on third-party defendants on the ground that the accident was due solely to the negligence of the latter, should be granted. Plaintiff's objection that the district wherein the action was pending was not the proper venue of an action against the proposed third-party defendants, overruled, because only the latter are entitled to assert it.

Subdivision (b)—When Plaintiff May Bring in Third Party

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

1. The United States may be made a third-party defendant in respect of a claim as to which Congress has waived the immunity of the United States to suit. (Rule 14)

2. Rule 3 relating to commencement of actions and Rule 4 (d) (4) relating to service upon the United States supplant the provisions of the Tucker Act (Sections 5 and 6 of the Act of March 3, 1887, 24 Stat. 506; U. S. C., Title 28, Secs. 762 and 763). (Rules 3 and 4 (d))

3. In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over. (Rules 24 and 13 (a))

4. When a counterclaim arises out of the same transaction as the main action, it must be set up and the court has jurisdiction even though it would not have had jurisdiction if the counterclaim were set forth in an independent suit. (Rule 13 (a))

5. The fact that a counterclaim and a third party claim interposed by the same defendant are inconsistent with each other, is no objection to bringing in the third-party defendant. (Rule 8 (e) (2))

6. A motion to strike an answer for failure to comply with a demand for a bill of particulars will be denied on condition that the defendant supply all of the particulars of which he has knowledge. (Rule 12 (e))

RULE 15—Subdivision (a)—Amendments to Pleadings

Warren S. Earhart v. Frank Valerius. (Western District of Missouri, REEVES, D. J., Dec. 1, 1938).

Order dismissing original petition because an appended exhibit disproved an averment in the petition is not necessarily an adjudication in defendant's favor and motion to strike out an amended pleading subsequently filed should be overruled.

Moore v. Illinois Central Railroad Company. (Southern District of Mississippi, MIZE, D. J., Oct. 3, 1938).

1. In a contract action removed from a state into a Federal court, plaintiff's motion for judgment declining defendant permission to plead further on the grounds that such further pleading was prohibited by State statute, was denied after the effective date of the Rules, the Court holding that the Federal Rules were controlling and that leave to amend pleadings should be freely given when justice so requires. Rule 15 (a))

2. The Federal Rules of Civil Procedure were applied, after the effective date thereof, in a civil action originally filed in a state court prior to September 16, 1938, but subsequently removed into a Federal court. (Rule 81 (c))

3. Application of the Rules, after the effective date thereof, in an action removed from a state court, was held not to work any injustice upon any of the parties. (Rule 86)

RULE 17—Subdivision (b)—Capacity to Sue or Be Sued

National Association of Industrial Insurance Agents v. C. I. O. et al. (District Court of the United States for the District of Columbia, BAILEY, D. J., Nov. 18, 1938).

An unincorporated labor organization is subject to suit in its common name.

RULE 24—Subdivision (a)—Intervention of Right

United States v. C. M. Lane Lifeboat Company, Inc., et al. (Eastern District of New York, GALSTON, D. J., Nov. 22, 1938).

In an action by the United States to recover on a bond to hold the Government harmless of liability for the use of any patent embodied in certain life boats purchased by the Government, the president of the vendor company who had agreed to indemnify the defendant surety company is a proper person to intervene and his application for permission to do so under Rule 24 (a) was granted.

Culmerville Coal Company v. Richard Downing, etc., et al. (Northern District of Ohio, Eastern Division, JONES, D. J., Nov. 25, 1938).

Attorney under a contingent fee agreement does not have sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all of the parties.

United States of America to the use and for the benefit of Foster Wheeler Corporation v. American Surety Company, et al. (Eastern District of New York, MOSCOWITZ, D. J., Nov. 28, 1938).

In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over.

Subdivision (a)—Intervention of Right; Subdivision (b)—Permissive Intervention

Isidor Tachna v. Insuranshares Corporation of Delaware, et als. (District of Massachusetts, MCLELLAN, D. J., Nov. 29, 1938).

1. In a derivative suit by stockholders in behalf of the corporation, other stockholders may not intervene as of right as parties plaintiff, in the absence of

a showing that representation of petitioners' interest is or may be inadequate. (Rule 24 (a))

2. In a derivative stockholders' suit in Massachusetts against a Delaware Corporation and its directors who are Massachusetts citizens, Massachusetts stockholders should not be permitted to intervene as parties plaintiff in view of the possibility that such intervention may deprive the court of jurisdiction and in the absence of a showing that representation of petitioners' interest is or may be inadequate. Rule 24 (b))

Subdivision (b)—Permissive Intervention

Frank C. Dolcater v. Manufacturers & Traders Trust Company, et al. (Western District of New York, KNIGHT, D. J., Nov. 21, 1938).

1. In an action by the guardian and next friend of infant beneficiaries under a will, to recover alleged excessive commissions paid to executors, the application of the mother of the infants, who was also an executrix, to intervene in her capacity as an executrix, should be granted but only on condition that she also intervene as an individual and be aligned as a party defendant. (Rule 24 (b))

2. Where a motion for leave to intervene was argued and submitted prior to the effective date of the Federal Rules of Civil Procedure, it should be decided under the old rules. (Rule 86)

RULE 26—Depositions Pending Action

National Bondholders Corporation, et al. v. The Honorable George W. McClintic. (United States Circuit Court of Appeals, Fourth Circuit, CHESNUT, D. J., Nov. 10, 1938).

1. An application for a writ of mandamus filed in the Circuit Court of Appeals to require a District Judge to vacate order staying the taking of depositions under the Federal Rules of Civil Procedure in an action which had been pending for nearly two years before the effective date of the Rules, was denied, the Court holding that mandamus will not lie to control the exercise of discretionary power under the Rules. (Rule 26)

2. The power of the district court to order that depositions shall not be taken in a pending action is discretionary and mandamus will not lie to compel the judge to vacate such an order. (Rule 30 (b))

3. Application of the Federal Rules of Civil Procedure to particular actions pending when the rules take effect is a matter of discretion and mandamus will not lie to compel a district judge to apply such Rules in any given case. (Rule 86)

Subdivision (a)—When Depositions May Be Taken

Andrew G. Saviolis v. National Bank of Greece and Hellenic Bank Trust Company. (Southern District of New York, BONDY, D. J., Nov. 16, 1938.)

Notice to take depositions given by plaintiff after answer has been filed, should not be set aside on the assertion that defendant intends to file an amended answer.

RULE 30, Subdivision (a)—Notice of Examination

Richard Bennett v. The Westover, Inc. (Southern District of New York, MANDELBAUM, D. J., Dec. 13, 1938.)

Notice to take deposition need not state the matters upon which the examination is sought.

Andrew G. Saviolis v. National Bank of Greece and Hellenic Bank Trust Company. (Southern District of New York, BONDY, D. J., Nov. 16, 1938.)

1. Notice to take deposition need not state the matters upon which the examination is sought. (Rule 30 (a))

2. Notice to take depositions given by plaintiff after answer has been filed, should not be set aside on the assertion that defendant intends to file an amended answer. (Rule 26 (a))

Subdivision (b)—Orders for the Protection of Parties and Deponents

National Bondholders Corporation, et al. v. The Honorable George W. McClintic. (United States Circuit Court of Appeals, Fourth Circuit, CHESNUT, D. J., Nov. 10, 1938).

The power of the district court to order that depositions shall not be taken in a pending action is discretionary and mandamus will not lie to compel the judge to vacate such an order.

RULE 31—Subdivision (d)—Orders for the Protection of Parties and Deponents

Fall Corporation, et al v. Yount-Lee Oil Company, et al. (Eastern District of Texas, ATWELL, D. J., Oct. 3, 1938).

Court's discretion to require that a deposition be taken on oral examination should be exercised when direct interrogatories are so numerous and involved, as to make it practically impossible to frame cross interrogatories. (Rule 31 (d))

RULE 33—Interrogatories to Parties

The Babcock & Wilcox Company v. North Carolina Pulp Company. (District of Delaware, NIELDS, D. J., Nov. 23, 1938).

1. In a patent suit, on plaintiff's objections to defendant's interrogatories for the dates on which the inventions were made, it was held that such dates should be supplied in exchange for a contemporaneous statement by defendant of dates relied on for showing anticipation or prior use.

2. Plaintiff should be required to answer defendant's interrogatories seeking information as to installations by plaintiff said to embody inventions of patents in suit.

3. Plaintiff should not be required in answer to interrogatories to "identify" the respective claims of the patents in suit applicable to his various installations.

4. Plaintiff should be accorded an inspection of the apparatus alleged to infringe and adequate drawings before being required to answer interrogatories asking whether drawings submitted show defendant's apparatus and its operation.

5. Plaintiff should not be required to answer interrogatories seeking detailed information about defendant's own acts which is in the possession of the latter.

RULE 34, Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Daniel C. Mulloney v. Federal Reserve Bank of Boston, et al. (District of Massachusetts, BREWSTER, D. J., Dec. 5, 1938.)

Plaintiff in an action for conspiracy should be required, on defendants' motion for further particulars, to specify whether alleged defamatory statements were oral or in writing, and, if the latter, to attach copies

of the writings, since such discovery may be had under Rule 34, providing for the production of documents, etc., for inspection.

RULE 35, Subdivision (a)—Order for Examination of Persons; Subdivision (b)—Report of Findings

John G. Kelleher, an infant by John A. Kelleher, his Guardian ad Litem and John A. Kelleher v. Cohoes Trucking Co., Inc. (Southern District of New York, CONGER, D. J., Nov. 10, 1938.)

1. A medical examination of a party to an action may be made with his consent on behalf of his adversary, without an order of the court. (Rule 35 (a))

2. The fact that a party to an action submits to a medical examination on behalf of his adversary without an order of the court, does not deprive him of his right to a copy of the report of such examination. (Rule 35 (b))

RULE 38—Jury Trial of Right

Pacific Indemnity Company v. Ted McDonald, et al. (District of Oregon, MCCOLLOCH, D. J., Nov. 15, 1938).

Questions that would be triable by a jury in an action for money damages are also triable by jury in an action for a declaratory judgment.

RULE 41—Subdivision (a)—Voluntary Dismissal; Effect Thereof—Paragraph (1)—By Plaintiff; By Stipulation

Culmerville Coal Company v. Richard Downing, etc., et al. (Eastern District of Ohio, JONES, D. J., Nov. 25, 1938).

Attorney under a contingent fee agreement does not have sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all of the parties. (Rules 24 (a) and 41 (a))

RULE 43—Subdivision (a)—Form and Admissibility of Evidence

United States of America v. Aluminum Company of America, et al. (Southern District of New York, CAFFEY, D. J., Nov. 28, 1938).

The Federal Rules of Civil Procedure do not change the rule as to admissibility of testimony of deceased or inaccessible witnesses, save what is there prescribed for taking depositions.

RULE 54—Subdivision (c)—Demand for Judgment

Frank E. Borton v. Connecticut General Life Insurance Company. (District of Nebraska, DONOHOE, D. J., Nov. 22, 1938).

An amendment to a complaint in order to pray for alternative relief is not indispensable in view of Rule 54 (c) which provides for granting the relief to which a party is entitled even if he has not demanded it.

Marie Catanzaritti, et al v. Lina Bianco. (Middle District of Pennsylvania, WATSON, D. J., Nov. 28, 1938).

Whether the plaintiff is entitled to the specific relief for which he asks, will not be considered on a motion to dismiss the complaint for insufficiency.

RULE 56, Summary Judgment, Subdivision (b) for Defending Party

Charles Blum Advertising Corporation v. L. & C. Mayers Company, Inc. (Eastern District of Pennsylvania, DICKINSON, D. J., Dec. 2, 1938.)

A summary judgment for the defendant should not be granted in a patent suit if the record, consisting of the pleadings and answers to interrogatories, indicates that the defendant may have been guilty of acts of infringement other than the one specifically admitted but claimed by him as a matter of law not to constitute infringement.

RULE 57—Declaratory Judgments

Pacific Indemnity Company v. Ted McDonald, et al. (District of Oregon, MCCOLLOCH, D. J., Nov. 15, 1938).

1. Action to recover damages caused by automobile collision was brought in State court. Insurance company which insured defendant in that action against liability, brought suit in Federal court for a declaratory judgment adjudicating that it was not liable because of breach of policy by insured. *Held*, the pendency of action in State court did not bar the action for declaratory judgment. (Rule 57)

2. Questions that would be triable by a jury in an action for money damages are also triable by jury in an action for a declaratory judgment. (Rule 38)

RULE 61—Harmless Error

Alto Cervin v. W. T. Grant Company. (United States Circuit Court of Appeals, Fifth Circuit, SIBLEY, C. J., Dec. 1, 1938).

In an action for wrongful death, the erroneous refusal of the trial court to admit the deposition of the deceased, is not a harmless error and judgment should be reversed on appeal.

RULE 73, Subdivision (d)—Supersedeas Bonds

United States of America, ex rel, Valentine Broadway Bowers, Jr. v. Chester Dishong, as United States Marshal of the Southern District of Florida. (Southern District of Florida, Miami Division, HOLLAND, D. J., Nov. 29, 1938.)

Rule 81 (a) (2) which makes the Federal Rules of Civil Procedure applicable to appeals in habeas corpus proceedings, does not extend to such proceedings the provisions of Rule 73 (d) relating to supersedeas bonds. The question of custody of a prisoner pending appeal in a habeas corpus proceeding is still governed by Rule 45, paragraph 2, of the Rules of the Supreme Court.

RULE 81, Subdivision (a)—To What Proceedings Applicable

United States of America, ex rel, Valentine Broadway Bowers, Jr. v. Chester Dishong, as United States Marshal of the Southern District of Florida. (Southern District of Florida, Miami Division, HOLLAND, D. J., Nov. 29, 1938.)

Rule 81 (a) (2) which makes the Federal Rules of Civil Procedure applicable to appeals in habeas corpus proceedings, does not extend to such proceedings the provisions of Rule 73 (d) relating to supersedeas bonds. The question of custody of a prisoner pending appeal in a habeas corpus proceeding is still

governed by Rule 45, paragraph 2, of the Rules of the Supreme Court. (Rule 73 (d))

(EDITOR'S STATEMENT OF THE CASE: This is a petition for a writ of habeas corpus. The relator was convicted of a violation of the mail fraud statute and was sentenced to two years' imprisonment in a penitentiary. After serving his sentence, less allowance for good conduct, he was granted a conditional release. Prior to the expiration of such allowances, he was arrested pursuant to a warrant charging him with a violation of the conditions of his release. The relator then filed a petition for a writ of habeas corpus, which was granted by the District Court. Subsequently the court entered an order discharging the writ. The relator appealed and applied for release on bail. The court made an order, under Rule 45, paragraph 2, of the Rules of the Supreme Court, that, pending the appeal, the relator be released on bond in the amount of $2,000; and requiring a cost bond of $250 under Rule 73 (c) of the Federal Rules of Civil Procedure.)

Shell Petroleum Corporation v. Paul O. Stueve. (District of Minnesota, SULLIVAN, D. J., Dec. 12, 1938.)

The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the Rules, unless their application would not be feasible or would work injustice.

Shell Petroleum Corporation v. Paul O. Stueve. (District of Minnesota, SULLIVAN, D. J., Dec. 12, 1938.)

The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the Rules, unless their application would not be feasible or would work injustice.

Subdivision (c)—Removed Actions

Moore v. Illinois Central Railroad Company. (Southern District of Mississippi, MIZE, D. J., Oct. 13, 1938).

The Federal Rules of Civil Procedure were applied, after the effective date thereof, in a civil action originally filed in a state court prior to September 16, 1938, but subsequently removed into a Federal court. (Rule 81 (c))

Frank E. Borton v. Connecticut General Life Insurance Company. (District of Nebraska, DONOHOE, D. J., Nov. 28, 1938).

Federal Rules of Civil Procedure govern all procedure after removal in civil actions removed to the District Court from a State court.

RULE 86—Effective Date

Moore v. Illinois Central Railroad Company. (Southern District of Mississippi, MIZE, D. J., Oct. 3, 1938).

Application of the Rules, after the effective date thereof, in an action removed from a state court, was held not to work any injustice upon any of the parties.

National Bondholders Corporation, et al. v. The Honorable George W. McClintic. (United States Circuit Court of Appeals, Fourth Circuit, CHESNUT, D. J., Nov. 10, 1938).

Application of the Federal Rules of Civil Procedure to particular actions pending when the rules take effect is a matter of discretion and mandamus will not lie to compel a district judge to apply such Rules in any given case.

William M. Knecht v. Castleman River Railroad Company. (Western District of Pennsylvania, SCHOONMAKER, D. J., Nov. 16, 1938).

In a case in which argument was had subsequently to September 16, 1938, on an affidavit of defense filed prior to that date under the Pennsylvania Practice Act, such affidavit should be treated as equivalent of a motion to dismiss under the new Rules. (Rule 86)

Frank C. Dolcater v. Manufacturers & Traders Trust Company, et al. (Western District of New York, KNIGHT, D. J., Nov. 21, 1938).

Where a motion for leave to intervene was argued and submitted prior to the effective date of the Federal Rules of Civil Procedure, it should be decided under the old rules.

Marie Catanzaritti, et al. v. Lina Bianco. (Middle District of Pennsylvania, WATSON, D. J., Nov. 28, 1938).

The existence of an adequate remedy at law is not ground for dismissal of an action begun as a suit in equity before effective date of Rules but which came on for hearing on a motion to dismiss after September 16, 1938.

Bringing Legal Institutes to Smaller Local Bars

(*Continued from page* 42)

Districts (64 of our 99 Counties) and most of them were attended by about 75% of *all* the lawyers in the District.

It was more or less a one man job the first year but in the second a special Committee (with a general director and secretary) has been appointed. They have divided the responsibility and are raising a fund of $3,000 by voluntary subscription in order that the field of activity may be broadened and the service extended.

The discussions centered around the every-day problems of the general practitioner. Such subjects as the "Widow's Distributive Share" and "New Developments in the Law of Evidence" proved popular. Speakers included some of the leading members of the bench and the bar and of the law teaching profession.

The movement has been a success.

There are infinite possibilities; it is the sure and certain way to eliminate petty local animosities; it creates a feeling of pride in belonging to an organization that is doing something constructive; it brings to the over-worked lawyers some actual relief and benefit in having difficult spots in substantive law or procedure ironed out by experts; it answers the questions of the young and inexperienced who need a place where they can be cleared up and straightened out. And it also furnishes an opportunity for those lawyers who really want a chance, while they are still alive, to make a contribution of some consequence to their fellow workmen.

And in conclusion, is it not true that the difference between a good trial lawyer and one who never gets far in a Court room is *often* nothing more than uncertainty or lack of confidence in procedure during those early and trying days when everything looks difficult if not impossible.

Once we develop the proper technique I believe the medium discussed herein will save to the profession many fine lawyers who need a little guidance and the encouragement produced by these frequent contacts with their brother workmen.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Compensation for Legal Services Denied Layman

FINK had once been claim agent for a railroad. While acting as claim agent for an insurance company, he undertook for a widow to negotiate a settlement of a claim against a railroad arising out of the death of her husband. He was not an attorney and, in the performance of the services rendered, which resulted in the railroad's payment of $8,000, did not pretend to practice law. Nevertheless, the Supreme Court of Indiana held that the services rendered did in fact constitute the practice of law and reversed a judgment of the lower court in favor of the plaintiff. Fink et al. v. Peden, 17 N. E. (2d) 95.

Attorney Disbarred for Making Unconscionable Contract for Compensation for Himself and Physician

In the case of In re Cassell, 7 N. Y. S. 2d 379, the Appellate Division of the Supreme Court of New York, First Department, disbarring the respondent, said:

"It has been conclusively established that the respondent participated in a scheme to obtain $1,200 from a client as compensation for a physician and himself for services to be rendered in obtaining the payment of moneys due under the disability provisions of certain insurance policies. The respondent knew that the services of both the physician and himself were of little or no value and that the insured could have obtained the payments without expense by making personal application to the insurance companies. The physician originally demanded that respondent's client pay him ten per cent of the disability payments made, and the client, considering such a demand exorbitant, sought the advice of the respondent with respect thereto. The respondent had, in the first instance, sent his client to this physician representing him to be a friend of the respondent and a doctor associated with one of the insurance companies in which the client was insured. The doctor had stated that he was a cousin of the respondent and that he was 'the main doctor' of the insurance company with which he was associated and that his signature upon an application for disability would be sufficient to result in the granting of the application. The respondent induced his client to agree to pay the doctor $1,000 and $200 to the respondent upon the representation that the doctor would antedate the claim and thus give the client the benefit of several additional monthly payments, and at the same time result in the saving of premiums which would otherwise be payable during that period.

"The respondent further attempted, by dishonorable and dishonest means, to secure the payment of the aforesaid amounts. He also attempted, while his client was seriously ill, to procure his signature to an application for change of beneficiary in a policy entrusted to him for that purpose, concealing the fact that instead of inserting the name of his client's son, as he had been requested to do, he had inserted the name of the doctor's wife as one of the beneficiaries entitled to receive $2,000 of the proceeds of the policy.

"The respondent should be disbarred."

Boston Bar Undertakes to Improve Economic Condition of Lawyers

The Boston Bar Association's council recently approved the creation of an agency designed to alleviate the economic difficulties of lawyers. It is also hoped that the plan will increase the efficiency of professional service to the public and develop a professional solidarity heretofore unknown.

The objective of the plan is to bring demand for lawyers' services into touch with supply and not only to place the idle attorney in line for employment but to see that the lawyer who is employed is doing the kind of work for which he is best suited.

The plan was evolved before the American Bar Association's Committee on Economic Condition of the Bar completed its survey, but is in line with the recommendations of that committee.

The agency contemplated will be a committee composed of men of standing and experience at the bar and who are willing to devote time to the problem at hand. It is expected that at least the part-time services of a paid secretary will be required.

The Committee that reported the plan to the Council expressed the view that "The economic burden on many members of the bar has become serious and is steadily growing heavier" and that "the situation not only makes a strong appeal to the sympathies of brother lawyers but it implies possibilities of real detriment to the reputation and welfare of the bar as a whole."

The Committee created, by maintaining a constant contact with courts and lawyers and by using such other contacts as may be available, will be able in some measure to coordinate the supply and the demand for whole time employment, occasional employment, mutual association on a cooperative basis, office space, and research work.

The report to the Council observed that the mere matter of getting work for lawyers should not overshadow the fact that many able lawyers, earning enough to live on, are not engaged in the kind of work for which they are best qualified. It was also stated that there probably are lawyers who would never put themselves in the position of seeking financial help, even by implication, but who would welcome the opportunity to become "lawyers' lawyers" in specialized fields, and the proposed agency might well function along those lines to the benefit especially of the clients and at the same time of all counsel concerned.

The promotion of greater congeniality among lawyers, by mutual introductions and by efforts to get the older and younger lawyers acquainted in the association's quarters and at its luncheon tables, will be another object of the committee. When the Council approved the plan and named the committee to carry it out, it declared the step taken was one of the most far-reaching ones ever taken by the association, and while the difficulties involved should not be minimized their ultimate solution might be regarded as assured.

Bar Associations Offer to Aid Victims of Loan Sharks

Inquiry was recently made of the Committee on Professional Ethics and Grievances by the bar association of a large city, as to whether it could properly tender free legal aid to poor people who are loan shark victims. The Committee advised the association that there was no impropriety in the association, through a proper committee, offering to furnish free legal services to persons unable to pay therefor under the circumstances mentioned. It followed the view expressed in Opinion 148, in which it was held that there was no ethical impropriety in the Lawyers' Committee of

the Liberty League offering its services without charge in defense of the constitutional rights of citizens unable to pay for them. The furnishing of legal services to indigent people is now generally recognized as the duty of the organized bar and there can be no impropriety in a group of lawyers publicly announcing their willingness to discharge the bar's duty to poor people. However, absence of improper motive or purpose would not be understood if such an offer were made by a single lawyer. His purpose would probably be and would certainly be understood to be the promotion of his own personal interests. Consequently, in Opinion 169, the Committee condemned an offer of free legal services to a labor union by a single lawyer, who was frank enough to state that he hoped that his contacts would lead to his receiving employment from members of the union. It had also condemned, without promulgating a formal opinion, an attorney's opening and advertising a free legal aid organization, where it was stated that free services would be rendered to those who were ascertained by him to be able to pay therefor.

Since the Committee's action in the case first mentioned above, another bar association has made a similar inquiry and stated that, subject to the Committee's approval, it proposes to offer to furnish free legal services to persons unable to pay therefor who are victims of loan sharks.

Legal Clinics and Such

The "legal clinic" idea, so much discussed in recent months, apparently is beginning to suggest to individual lawyers the possibility of its use to their individual profit.

One lawyer wrote the Committee on Professional Ethics and Grievances that he intended to form an organization, whose purpose would be that of a "legal clinic." Individuals, families, partnerships and corporations could become subscribers for a nominal fee for which the clinic would handle specified legal matters for them through competent and reputable attorneys whose fees would be paid by the clinic.

Another attorney wrote that he was desirous of forming a "legal protective association" in which "the membership . . . for a specified regular membership fee, would be entitled to certain specified legal protection, including representation in court, consultation, etc."

The Committee advised that neither of these schemes could be approved. The organizations contemplated, under the circumstances set forth, would clearly be engaged in the unauthorized practice of the law. The attorneys serving their members for a fee paid by the organization would be aiding it in the unauthorized practice of the law, which is forbidden by Canon 47, as follows:

"No lawyer shall permit his professsional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of the law by any lay agency, personal or corporate."

COMMITTEE ON PROFESSIONAL
ETHICS AND GRIEVANCES,
H. W. ARANT, *Chairman*.

Junior Bar Conference at Durham

AN important regional meeting of the Fourth Federal Circuit and the District of Columbia was held at Durham, North Carolina, on November 25th. Sponsored by the Durham Junior Bar Association and with the arrangements in charge of Henry Bane of Durham, the Conference State Chairman for North Carolina, this meeting proved to be one of the most successful of its kind.

The meeting opened at 10:00 A.M. with Egbert L. Haywood, President of the Durham Junior Bar Association, presiding. Honorable J. Elmer Long, Durham, former president of the North Carolina Bar Association, delivered the address of welcome, to which response was made by Benjamin Scott Whaley, Charleston, South Carolina, Conference State Chairman for that State. John J. Sirica, Washington, D. C., Conference Chairman for the District of Columbia, read an address prepared by Mr. Paul F. Hannah, of Washington, D. C., Vice-Chairman of the Conference on "Why a Junior Bar Conference." "American Citizenship" was the topic of an eloquent address made by Ralph R. Quillian, Atlanta, Georgia, Chairman of the American Citizenship Committee of the American Bar Association and an active member of the Junior Bar Conference.

The morning session adjourned for luncheon at 12:45 P.M. Luncheon with the compliments of Duke University was served in the Ball Room, West Campus, on the university grounds. Professor Malcolm McDermott of the faculty of the Duke University School of Law addressed the gathering after the luncheon. He was introduced by Edward L. Cannon, Durham, former president of the Durham Junior Bar Association. Mr. Bane presided during the luncheon program.

The afternoon session was called to order at the University Law School at 2:45 P.M. with Charles E. Pledger, Jr., Washington, D. C., Council member from the District of Columbia, presiding. Lewis F. Powell, Jr., Richmond, Virginia, Council Member for the Fourth Circuit, as the first speaker of this session outlined the program of activities to be stressed in that circuit during the present year. The Chairman then introduced Fleming B. Bomar, Durham, President of the Durham Bar Association, who spoke on "Student Bar Association Activities." Reports for their respective States were then given by William T. Muse, Richmond, Virginia; Mr. Bane for North Carolina; Mr. Whaley for South Carolina, and Mr. Sirica for the District of Columbia. Severe weather prevented the attendance of representatives from Maryland and West Virginia.

Professor Paul H. Sanders, of the faculty of the Duke University School of Law, started a lively discussion with his talk on "News and Views of Unauthorized Practice of Law." The spirited discussion had to be closed in order to permit the group to attend the Durham Junior Bar Association's fourth annual banquet at the Carolina Inn, Chapel Hill, North Carolina. Many of those who came for the meeting stayed over for the football game between the University of Pittsburgh and Duke University. Due to the sleet and snow storms prevailing from Thursday to Saturday of this week-end, the attendance was considerably reduced from what the committee in charge had been led to expect. Nevertheless, the Durham Regional Meeting in its business and entertainment programs almost assumed the aspect of an annual meeting of the Conference. In spite of the bad weather handicap it was a successful affair. The interest aroused in the American Bar Association and the Junior Bar Conference and the thorough enjoyment of the social side of the meeting amply repaid those who worked so arduously for its success, and those who with great difficulty traveled some distance to attend.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LABOR LAWS IN ACTION, by John B. Andrews. 1938. New York: Harper & Brothers, xviii, 243 pp.—Mr. Andrews is especially qualified to write on labor laws in action. As Executive Secretary of the American Association for Labor Legislation he has been putting into practice for more than thirty years his belief that the draftsman of a labor bill should not only have in mind the evil to be remedied, which is diagnosis, but also the way the evil is to be remedied, which is treatment and cure. Treatment means administration, and the author does not exaggerate in saying that "in labor legislation as in all legislation, administration is the breath of life" (p. xiv). But if this be so, "the need for impartial administration so strikingly apparent in labor law enforcement" raises the question of the importance of removing administration from partisan politics in the interests of "continuity and political non-partisanship in labor department policies." This thought runs through his exposition and criticism of the practice of American states in the set-up and operation of enforcement machinery from the early fact-gathering bureaus of labor statistics to highly developed departments such as those in New York and Wisconsin.

The author believes in a centralized labor department and points out the trend towards putting into a single department not only the administration of legislation protecting labor, such as factory laws, but also of social legislation, mainly concerned with labor, notably workmen's compensation and unemployment insurance. He shows the tendency to encourage cooperation of employers and workers in the administration of labor law and discusses various methods of securing this cooperation (p. 29ff). But no matter how good the staff work in the department may be, it is through the factory inspection only that the labor law becomes a reality. The discussion in Chapter V of American factory inspection is based on a wide experience in observing factory inspection in many of the states of the United States and in Great Britain, and thus is written with a sense of reality and practical possibility.

Mr. Andrews embodies the result of his own investigation, and of a wide reading, in a chapter on British factory inspection, in one on national labor law administration in the United States, and in a very interesting chapter on the administration of international labor legislation. He points out the interesting similarity between American states and the International Labor Organization. At first both were interested in "passing a law." Both have come to appreciate that "whate'er is best administer'd is best"; and as they become more realistic, they become more administration-minded.

JOSEPH P. CHAMBERLAIN.
Columbia University.

The British Yearbook of International Law. 1938. New York: Oxford University Press. Pp. 316.—The annual appearance of the British Yearbook of International Law is a noteworthy event in international law circles, for students of the subject have become accustomed to expect in this series a collection of significant articles of very high grade. The 1938 volume should disappoint no one; in fact, it surpasses in quality many of the issues and is definitely of top-flight rank. Moreover this Yearbook number should prove particularly interesting to the municipal or domestic lawyer because of the inclusion of several articles which concern national law directly.

In the light of all that is happening in the Far East, it is fitting that the book should open with a discussion of some of the intricate problems of law involved in that sector, and the author, Sir John T. Pratt, in "The International Settlement and the French Concession at Shanghai" gives a clear explanation of the history and present status of foreigners' rights in that city. The legal picture is indeed complex. The land in the Settlement belongs to China, and China has considerable jurisdiction therein, but the citizens of other powers enjoy great autonomy achieved through liberal if not always accurate interpretation of agreements with former Chinese régimes. How our State Department and other Foreign Offices will attempt to unravel the skein with the Japanese gives rise to some interesting speculations.

Probably the most stimulating and important contribution to this issue is that of Dr. Friedmann on "The Growth of State Control over the Individual and its Effect upon the Rules of International State Responsibility." In the past, international law rules have been predicated upon the distinction between governmental and private enterprise. They assumed a wide area of freedom for the individual, and laissez-faire was the keynote of the system. States were responsible only for official acts or for failure to exercise "due diligence" in protecting a foreigner, and in turn claimed immunity from suit in foreign courts. With the growth of state interference in all branches of community life, even in the United States where the sale of arms is regulated by the government, new problems arise. When the government goes into the shipping business, should its vessels be entitled to the immunities of warships? Should the U. S. S. R. be barred from selling munitions when it is a neutral because there is no private manufacture in that country? Should the German government be held legally responsible for statements in its "co-ordinated" press? Dr. Friedmann explores these problems in brilliant fashion and in so doing probes deep into the central problem of contemporary international society: namely, is there anything left of traditional international law in a world of states divided

ideologically and dedicated more and more to state control of every form of internal activity?

Professor Garner's keen analysis, in another article, of the contents and weakness of the 1937 so-called neutrality law deserves careful reading. As he says, the act affords no safe protection against entanglement in another war, erecting no safeguard against the effects of propaganda and emotionalism which are more dangerous than disputes over arms shipments or increases in the volume of sales to belligerents.

The other articles are excellent, too, but are of perhaps less general interest. Some of them, like "Conflicts of Jurisdiction in Matrimonial Disputes" and "The Application and Interpretation of Municipal Law by the Permanent Court of International Justice," make good reading for international and domestic lawyers alike. The editors of the Yearbook are to be congratulated as usual.

PAYSON S. WILD, JR.

Harvard University.

Cases and Other Materials on Trade Regulation, by Milton Handler, 1937. Chicago: The Foundation Press, Inc., Pp. 1253, appendix and index.—It would be an interesting speculation to determine why the number of books and articles published in the field of labor law and labor economics has been so great, while the similar writings dealing with trusts and monopolies, industrial combinations, and competitive trade practices have been relatively sparse.

An intensive examination of university catalogues would raise the same question. Many more courses are offered not only in the faculties of law but also of economics with respect to the status of the worker under the law and in society, than those covering the legal issues confronting large scale units in industry, aspects of cooperative activity, and problems in law, economics and ethics concerning competitive practices. It is for this reason that when a book appears dealing with a comprehensive survey of that vast subject matter embraced by the term, "trade regulation," that the members of the bar should note its appearance.

There has been an unfounded prejudice by some bar association librarians and practitioners against incorporating in their libraries the admirable case books on special branches of the law, which have been compiled by eminent professors of law, especially in the last few years. As a practical matter, there are certain segments of the practice of the law which are necessarily bound up with current thought not only as expressed in the existing statutes, court decisions, and law review writings, but which must be studied in connection with the contributions being made concurrently in the cognate fields of business administration and various social sciences.

The recent creation by the Congress of the United States of the Temporary National Economic Committee, commonly known as the Monopoly Inquiry, will unquestionably stimulate a greater interest in the legal profession in problems connected with the regulation of competitive activity by governmental intervention. Already, a questionnaire has been sent to some two thousand five hundred trade associations, which presupposes a knowledge of law which the lay secretaries of the associations, lacking legal training, cannot possess. Responsibility will ultimately be passed on to the bar.

It is, therefore, incumbent upon members of the bar that they become adequately informed about the present legal problems involved in the relationship of government and industry which the investigation will accentuate.

It is most fortunate that an encyclopedic book has been compiled by Professor Milton Handler, who is an associate professor of law at Columbia University, and is recognized by all students of the subject of trade regulation as one of distinguished ability and originality.

As the title of the volume indicates, it is more than the old-fashioned case book. It is also a collection of materials which covers practical as well as theoretical matters, a complete historical background, and an analytical discussion of the cases decided by the Supreme Court of the United States and various other jurisdictions both in this country and abroad.

As indicative of the scope of the volume, a reference is made to some of the chapter titles: Government and Business; the Emergence of the Competitive System; Contracts and Combinations in Restraint of Trade at Common Law; the Sherman Anti-Trust Act; Legal and Economic Aspects of Trade Associations; Industrial Mergers; Stock Acquisition, Holding Companies and Interlocking Directorates.

In addition there are several thorough chapters on Trade Marks and Trade Names, Regulation of Advertising, Appropriation of Competitor's Trade Values; Misrepresentation of Competitor's Products, and a multitude of problems involved in price discrimination. In each of these chapters there is a complete citation of statutes and decisions, historical background, practical and theoretical analyses of materials, and elaborate footnotes in which the author discusses and points out inconsistencies in the cases, whether actual or supposed.

The reviewer recently completed an analysis of trade associations under the anti-trust acts[1] and found the source materials contained in Professor Handler's work a veritable mine of information in the preparation of his book.

BENJAMIN S. KIRSH.

New York City.

The Sex Criminal, by Bertram Pollens. 1938. New York: The Macaulay Company, pp. 211—In the summer of 1937 Mayor LaGuardia ordered that all men sentenced to the institutions of the New York City Department of Correction for indecent exposure, impairing the morals of a minor, sodomy, or attempted rape should be given a psychiatric examination while in prison. Furthermore he ordered that each of these men upon release should be produced before a magistrate who would decide on the basis of the prison report whether or not he should be committed to the psychopathic ward of Bellevue for further observation as to possible commitment to an institution for the insane or mentally defective. Bertram Pollens, senior psychologist of the New York Penitentiary, was given administrative charge of this sex-clinic.

It may be objected that his book has been written too soon to give us a longitudinal survey of much value. It should be noted also that this clinic receives only misdemeanants, felons being committed to state prison. In his discussion the author does not make plain which cases he has actually examined and which he knows only by information. Psychologists will be disappointed at his failure to mention any of the research studies in this field.

Nevertheless this book will be found interesting

1. *Trade Associations in Law and Business,* by Benjamin S. Kirsh, in collaboration with Harold Roland Shapiro, New York, 1938.

by those who wish an elementary understanding of this important subject. The approach of the author is Freudian, sketching the psycho-sexual development from the polymorphous-perverse, through the homosexual, to the heterosexual stage. According to his theory the sex criminal suffers from an undeveloped or weakened Ego or Superego which allows expression of the destructive tendencies in the Id. His difficulty is not in the intellect but in the emotion; hence he commits his acts by reason of powerful blind impulses which he is unable to control. He is no more to blame for his condition than is a person who has contracted tuberculosis, and should not be made the victim of popular hysteria. Only a negligible number are feeble-minded or insane in the legal sense that they do not know the nature and quality of their acts. In answer to the question whether the the sexual deviate is born or made, the author states that although hereditary factors are important in shaping the sexual destiny of the individual, the environmental factor is probably responsible for most of our sexual misfits. This he considers hopeful because we can do something about altering environmental influences.

He recommends private trials to encourage victims to prosecute sex offenders and prohibition of publication of pictures or names and addresses of sex crime victims. He decries detailed newspaper descriptions of sex crimes which serve to inflame others. He suggests that existing offenders be placed in psychiatric care rather than being sent to jail. More important is a comprehensive program of prevention. Parents are advised to consult experts about their own emotional and sexual problems so that they may handle the problems of their children in a scientific manner. A broadened educational program should be formulated to train the emotions as well as the intellect. The goal is the use of man's tremendous sexual urges in a sublimated form which does not conflict with our social and moral codes.

The Adolescent Court and Crime Prevention, by Jeanette G. Brill & George Payne. 1938. New York: Pitman Publishing Co. Pp. 230—The collaboration of Jeanette G. Brill, New York magistrate, and E. George Payne, chairman of the department of educational sociology of New York University, has produced an authoritative book. Pursuant to a resolution of the Board of Magistrates of the City of New York, a special branch of the magistrate's court, a social experiment to be known as the Adolescent's Court, was inaugurated in January 1935. It recognized the discrepancy between criminal and civil law in regard to the age of legal responsibility. Brooklyn boys of sixteen, seventeen, and eighteen now appear for examination before this court. To minimize degrading jail experience they are segregated in a separate wing of Brooklyn City Prison while undergoing detention. The jurisdiction of the court is greatly increased by the substitution of wayward minor complaints, with the consent of the district attorney and complaining witnesses, for complaints of felonies and misdemeanors. About 25% of the cases are retained for disposal instead of being held for the Court of Special Sessions or the Grand Jury. The court convenes every day of the week. It has four permanent judges, sitting in rotation for two week periods. They hear only six or seven cases a day. They are assisted by six probation officers who have been carefully selected by civil service. The result of such individualized treatment is that 87% of the boys received by this court-clinic make good.

The experimental period of one year has been extended indefinitely, and it is hoped that such courts will eventually be established in other boroughs of the city. The obtained experience is leading to a revision of attitudes toward adolescent crime and the treatment of the adolescent offender. To further the work of the court the authors offer several recommendations. The probation case load needs to be reduced from its present high level. Routine psychiatric and psychological examinations are needed to sift out the mentally inferior. Wayward minor cases brought in by parents should be handled informally without court action. Most important of all is that the magistrate needs to be relieved from the restriction of the code of criminal procedure that compels him to select cases upon arraignment without an opportunity for thorough investigation.

The book treats crime as more than a juridical problem. It is seen not as an isolated act, but as a *Gestalt,* or social pattern, related to the mental and physical condition of the offender, the whole sequence of events of his life, and the social and cultural situations in which his criminal behavior takes place. The family, the school, and the community are discussed in their relation to crime prevention. The importance of early home environment and family traditions of lawlessness in the motivation of crime are stressed. Since the school does not receive the child until an age when his behavior patterns are well formed and since it operates on a budget one-fifth of that devoted to crime suppression, its failures are condoned; however it can see to it that the child does not form embittering habits of failure and that the curriculum is fitted to his individual needs. Instead of easing its conscience by punishing those who emerge as expressions of a vicious environment, the community must offer adequate opportunities for satisfying the natural desires of adolescent boys if they are not to become members of cellar clubs and criminal gangs. Serious study must be given to community disorganization as evidenced by poverty, bad housing, lack of social controls, and corrupt politics.

In support of such thesis many interesting case histories are given. The book is ably written and deserves reading by all who are dealing with adolescent problems. An index would improve its utility as a reference work.

The Peyote Cult, by Weston La Barre. 1938. New Haven: Yale University Press. Pp. 188—The first legal notice of peyote is in the 1719 report of the trial of a Taos Indian who had "disturbed the town" after swallowing the narcotic. Peyote is a small, spineless cactus growing in the Rio Grande valley. The nine narcotic alkaloids which it contains produce profound sensory and psychic derangements. Originally eaten or drunk in the form of tea as a cure for disease, it came to be cherished in religious ceremonials for the visions it brought. Pharmaceutical recognition as a sedative, which it received for a short period, has been withdrawn because of its high toxicity and uncertain effect.

Under the auspices of Yale University and the American Museum of Natural History the author gathered data from fifteen Indian tribes in preparation of

this book. He finds that since 1870 the use of peyote has supplanted the older native religions and that with a superficial admixture of Christianity peyote is today the religion of the majority of the Plains Indians. Through the efforts of missionaries its use continues to spread among the Indian tribes of the United States and Canada and to some extent the Negro.

The cult has had considerable legal difficulties. Although repressive federal legislation has been sought since 1897 it was still pending at the time this book was written in the form of Senate Bill 1399. State laws exist in Colorado, Idaho, Iowa, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming. On the other hand hostility has stimulated peyote users to seek legal security. In 1914 the "First Born Church of Christ" was incorporated under the laws of Oklahoma. This was later absorbed by the "Native American Church" incorporated in 1918 in Oklahoma and later in Montana and Nebraska.

JAMES HARGAN.

New York City.

Engineering Terminology: Definitions of Technical Words and Phrases, by Victor J. Brown and Delmar G. Runner. 1938. Chicago: Gillette Publishing Co. Pp. ix 310—This work is prefaced with the statement that when contracts relating to engineering projects are drawn there is frequently employed engineering terminology which has become rather well recognized in the industry without having found its way into the dictionary. Frequently, too, the same word or phrase has a slightly or completely different meaning in different branches of the engineering field. When litigation arises and the contract falls into the hands of a stranger, usually the judge, he is at a loss to understand the hidden meaning behind the technical phrases. With this dictionary the authors seek to provide an escape for the uninitiated reader of the contract.

The intention of the authors is most laudable and will be appreciated on some hands. However, the field covered seems to the reviewer to be so narrowly confined that much of the usefulness that might be anticipated from the preface is not present. Within the field of construction engineering the authors appear to have done their work well. A fair cross-section of the definitions correspond to the reviewer's ideas of what they should be. Construction engineering is undoubtedly the most fruitful in litigation with its large undertakings so often involving a governmental body. But engineering has many branches which appear to have been much neglected. It is to be hoped that the authors will in their next edition expand the text to make it of more general utility, rather than qualify the title as they must surely do if the scope of the present text is retained.

KEITH MISEGADES.

North Chicago.

The Troubled Mind: A Study of Nervous and Mental Illnesses, by C. S. Bluemel. 1938. Baltimore: The Williams & Wilkins Company. Pp. 250—This full, departmentalized book is easy to read; its clarity leads one on and on. Perhaps it has too many illustrative one-paragraph case histories which if indented would make the context still easier to follow.

The author's psychiatry is modern, is scientific, is well balanced, and his choice of terms is modern American rather than German-Latin. It is a splendid and authoritative book.

It begins with fixed ideas and reactions. The normal mind has many fixed ideas, the troubled mind has more and worse fixed ideas—fears, compulsions, self-consciousness, and all of us at peace or troubled have been more or less correctly and distortedly trained. Of such are jurymen and witnesses, those before the bar as well as those of the bar and bench made: of such are the man in the street, his wife, his neighbors, his supporters in industry and in merchandising made. Inability to change the type of one's thinking is illustrated. Fads and crazes are explained. Mental habits of the well ordered and of the criminals follow patterns. We hear what we listen for, we see what we seek, we are all preoccupied. Guilt reactions warp our self-determination of future conduct: distrust follows. (The guiltless are so agreeable that they are susceptible to impoverishment; they have no strong "No.")

Psychoneuroses differ from psychoses in several ways. They are of shorter duration, they affect the organs of the body more than they affect the intelligence or distort the conduct, they depend for their origin in part on substandard health. Dr. Bluemel's description and illustrative cases make comprehension lucid. His chapters are short: e. g., insomnia, headache, sensitivity, faintness, etc. His description of the psychology of psychoneuroses is intriguing: e. g., men usually have "to-reactions" and women "from-reactions" or aversions or are conservative. They vote "against" because of antipathy; yet no person, man or woman, is free from surprise at his own or her own reactions. Women especially are enigmas. Negative reactions are difficult to comprehend.

Traumatic hysteria is given a whole, but brief, section of six chapters.

The larger section on mental illnesses closes with a thought-provoking chapter on "The Public Lunatic," the menace of the psychopath at large. The effect on society of misfits is enormous, whether the misfits be individually engaged or be in public office. Some fierce leadership is psychopathic leadership.

In general this excellent book, encyclopedic in its illustrative cases, does enable its readers to understand better the people who, with him, occupy the world. May the reviewer add, in some respects the world of humans has also a troubled mind?

HAROLD S. HULBERT.

Chicago.

James Madison, Philosopher of the Constitution, by Edward McNall Burns. 1938. New Brunswick: Rutgers University Press. Pp. 212.—We all know that Madison was one of the most influential members of the convention that drafted the constitution of the United States; that as a member of the first Congress he introduced the bill which led to the first ten amendments, and that as Secretary of State and President he had further opportunities to impress his ideas into our polity. Those ideas, therefore, are not merely the cogitations of a political philosopher. They have the weight of precedents.

Madison himself never collected them in one place and, naturally, his ideas were not precisely the same at all periods of his life. Mr. Burns has done an excellent job of collecting and digesting Madison's scattered opinions on constitutional questions. Anyone who had occasion to make a study of such a question, for exam-

ple, as the President's power of removal would find this book a short-cut to various expressions by Madison which might be useful.

It is not quite clear that this was Mr. Burns' object. The title suggests a biography but there is nothing in the nature of a biography about this book unless we wish to apply that word to a brief and colorless sketch of Madison's life which constitutes the introductory chapter.

Mr. Burns has annotated and indexed his work and has supplied a full bibliography.

KENNETH B. UMBREIT.

New York City.

Radio Law: Practice and Procedure, by Clarence C. Dill. 1938. Washington: National Law Book Co. Pp. 353.—Radio law is novel in our jurisprudence and Mr. Dill's enlightening treatment of this complex and unusually technical subject is as readable as a novel. This is the first comprehensive treatise on radio law, and the author, as a pioneer, has not only "blazed the trail" for our profession and the industry, but has "paved the way" through the rugged legal topography of legislation, Commission rulings and court decisions.

Mr. Dill, possessing the extraordinary qualifications of radio-lawmaker and expert practitioner, has analyzed the development of the law and procedure. He has succeeded in simplifying a complicated subject and in making lucid the abstruse law of radio.

Adequate historical and technical information in this book enables one to comprehend the theory of radio. Basic legal standards are discussed and useful guides through the procedural maze are furnished. Although the book was published too early to contain information on recent international radio conventions and several important decisions, it is a welcome addition to the "sum total of human knowledge."

The Investment Value of Goodwill, by Lawrence N. Bloomberg. 1938. Baltimore: The Johns Hopkins Press. Pp. 70.—This monograph endeavors to compare the investment values of "goodwill' and tangible property. The economist, accountant, lawyer and courts have attempted to define and value "goodwill," but this study by a student of investments is rare.

The author lists three "goodwill' concepts as buyer, industrial and financial "goodwill." Financial "goodwill" is described as "the friendly attitude of the money market toward a company"; industrial "goodwill" assumes the nature of the employer-employee relationship, and buyer "goodwill" is "the favorable attitude of the persons to whom a concern sells." The author presents a study of buyer "goodwill" as an asset which has been undervalued.

Despite the imperfections of the five tests used, Mr. Bloomberg has concluded that:

During the last twenty-five years, stocks of companies which relied largely upon "goodwill" for earnings have been much more profitable than stocks of corporations which had large amounts of physical assets but slight buyer "goodwill."

This is a thought-provoking treatise and, although it is not definitive, I shall increase the investment value of "goodwill" in my future calculations.

MILFORD SPRINGER.

Washington, D. C.

Catalogue of the Manuscripts of Jeremy Bentham in the Library of University College, London, by A. Taylor Milne. 1937. London: University College. Pp. 147. Most of the writings published by Bentham himself, and some that had not previously been printed, appear in John Bowring's edition of the *Works*. But that much valuable material remained unnoticed in the very large collection of Bentham manuscripts preserved at University College, London, was made clear by Elie Halévy's *La Formation du Radicalisme Philosophique* and by C. W. Everett's edition of the *Comment on the Commentaries* and his *Education of Jeremy Bentham*. The present volume provides an adequate catalogue of these papers, and makes clear for the first time, to all who have not actually examined the manuscripts themselves, the wide range of Bentham's correspondence and the enormous extent of his interests. Quite apart from the subjects with which he usually is identified, Bentham wrote as well on nursery schools, poor law reform, the improvement of philological research, the policing of the Thames, the reform of book keeping, the axioms of mental pathology, a method for improving the harpsichord, the simplification of musical notation, and countless other topics that at one time or another attracted his atteention. These contributions may not all deserve the most careful scrutiny, though in view of the attention that is so carefully devoted to the smallest scrap of ana about Dr. Johnson or Horace Walpole, that matter must remain an open question. But certainly Bentham's unpublished papers on law reform, especially codification, his draft project for a school of legislation, many of his short pieces on a variety of administrative and legal topics, and a substantial selection from his letters deserve examination and publication. The present catalogue is a first step in that direction, and now that the collection is adequately available to scholars new light may be expected both upon Bentham himself and upon the influential Benthamites. We owe a debt to University College and to the other generous donors whose zeal has made its publication possible.

S. E. THORNE.

Northwestern University School of Law

Predicting Criminality: Forecasting Behavior on Parole, by Ferris F. Laune. 1936. Evanston and Chicago: Northwestern University. Pp. 158.—The parole problem is notoriously a very difficult one. In principle, all enlightened communities recognize the right of the convicted person to the chance to rehabilitate himself and return to free society and economic independence. This policy of freeing a prisoner conditionally and then, after a reasonable probationary period, relieving him of all restraint, is expedient socially and right ethically. But *when* is a given prisoner ready for parole? Under what circumstances is it *safe* to free him? Here, of course, is a strictly scientific question, to be answered without the slightest sentimentality, doctrinairism, or political advantage to the party responsible for the administration of justice.

That politics has played a part in parole administration in many instances, is undeniable. That parole has been abused, and crime encouraged by careless, arbitrary or improper application of the parole principle, are facts generally admitted. But such abuses are by no means natural or inherent in the parole system. Tests can be, indeed have been, devised for the determination of fitness for parole, and even better tests are in process of development. Competent and upright parole boards can and should employ the most approved tests.

The volume under notice is study No. 1 in the

Northwestern University's series of studies in the social sciences. It is hightly creditable to the able group of professors and criminologists under whose direction the study was made, and to the author of the book in which the procedures, methods and results of the study are admirably explained and interpreted.

It is established beyond rational doubt that behavior on parole is predictable, provided the right tests are used in ascertaining the mental and emotional attitude of the convict seeking parole. In other words, parole can be rendered practically safe to society. Just how this is accomplished cannot be adequately set forth in this notice. The matter is complex and technical. The book, therefore, is not easy reading. But lawyers and students of law should master it, since they may be called upon to appear for, or against, convicts applying for parole. It may be said that certain "hunches," or judgments of fellow prisoners, have been found remarkably trustworthy, and science furnishes ample warrant for reliance on such judgments, if they are elicited with tact and skill. Prisoners cannot act formally as advisers of parole boards, but informally they are in a position to give sound and helpful advice.

In fact, the claim is made that the same tests and procedures are likely, in time, to afford guidance in industry and in love and marriage! Enough has been said, it is hoped, to induce many lawyers, criminal and other, to read and ponder a study of great value to society and to government.

VICTOR S. YARROS.
The John Marshall Law School, Chicago.

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Administrative Absolutism, John D. O'Reilly, Jr., 7 Fordham L. Rev. 310. (N. '38; New York City).

The last report, the Pound report, of the Special Committee on Administrative Law of the American Bar Association is analyzed with the result of combating some of Dean Pound's strictures on American Administrative Law. Objection is made to the use in the report of the term "Administrative Absolutism;" to the implication "that the growth of administrative jurisdiction is repugnant" to the dogma of separation of powers, for the problem is one of expediency, not of constitutional limitations; and to a false issue that there is a contest between those who wish and those who do not wish to have judicial review of administrative action. There is "little dispute as to need of checks upon administrative action generally." However "it would be a mistake to think that revision of the process of judicial review could be effected by direct methods." The following indirect remedies are advocated: (1) more education in administrative law; (2) improvement of administrative personnel; and (3) better legislative draftsmanship.

BANKRUPTCY

Corporate Reorganization Under the Chandler Bankruptcy Act; Emmet McCaffrey, 26 California L. Rev. 643. (S. '38; Berkeley, Calif.).

This discussion of one part of recent Congressional action is not easy to summarize and it is not interesting reading except, perhaps, for the expert familiar with the difficulties of corporate reorganization. The author is not at fault. The subject matter is statutory, detailed, and exacting. Other articles, which dealt with the prospective legislation, appeared during the last academic year. The well known 77B of the old act has been worked over and reforms have been added. These concern the district in which bankruptcy proceedings may be filed; the requirement for the appointment of a disinterested trustee "where the liquidated indebtedness of the debtor equals or exceeds $250,000;" the presentation of a plan of reorganization by the trustee or his conclusion that no plan can be effected; the advisory report thereon by the Securities and Exchange Commission; the preliminary approval of the plan by the court before acceptance by or solicitation of acceptances from the creditors; allowance of compensation to those who do some of the work of reorganization; payment of accrued taxes and other items too numerous to mention. In any event the bankruptcy act today is a vastly different piece of legislation compared to that in the books in 1929. "Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act," by John Gerdes, appears in 52 Harvard L. Rev. 1.

CENSORSHIP

Judicial Censorship of Obscene Literature, Leo M. Alpert, 52 Harvard L. Rev. 1. (N. '38; Cambridge, Mass.)

Entertaining is this discussion of three hundred years of legal efforts to suppress the obscene in literature, and incidentally, lewd conduct. Careful preparation of the reported decisions would be assumed. In addition, the author is well acquainted with literature and his effort itself is one of literary merit. There is no sympathy for our efforts to suppress and the puritanical protectors of our morals are on the receiving end of many sharp and clever thrusts. The evidence does not establish the need for censorship but deeply rooted feelings prevent the abolition of it.

CONSTITUTIONAL LAW

Constitutional Issues in the Supreme Court, 1937 Term, Osmond K. Fraenkel, 87 U. of Pennsylvania L. Rev. 50. (N. '38; Philadelphia, Pa.)

At the end of the fourth of these annual reviews and summaries of the work of the United States Supreme Court, the author gives us the benefit of his thinking about the constitution and the institution of judicial review. (1) "No democracy can endure which shackles the power of the government on the specious plea that only thus can industry function." (2) But judicial review is not to be destroyed; otherwise there

is too much danger of the destruction of the civil liberties of the minorities. (3) Apparently he does not favor an easier method of amending the constitution; there is too much danger of this being used to restrict liberty "in times of sweeping hysteria by bigots." Yet unless people cherish liberty and will struggle to preserve it, "it cannot survive in any case." (4) The remedy is (a) to redraft the bill of rights and (b) reduce the due process clause "to its original, purely procedural, meaning." This program will hardly satisfy those who believe that there are other provisions in the constitution, aside from the bill of rights and due process, which need amendment but find the path of reform exceedingly discouraging due to the highly restrictive amending clause.

INTERNATIONAL LAW

Neutrality, Edwin Borchard, 48 Yale L. Jour. 37. (N. '38; New Haven, Conn.)

On the question of neutrality, Professor Borchard is not neutral; he is almost belligerently for it, 1914 style. "Twenty years of effort to set up new ways of running the world have produced only confusion and an intensification of nationalism and armament heretofore unknown." The most that he will concede, apparently, is the desirability of the calling of a Third Hague Conference to discuss a change in the rules to strengthen the rights of neutrals. Certain "illusions" are explained and dismissed: (1) that international law should preserve peace; (2) that collective security is workable or beneficial; (3) that all treaties are sacred; and (4) that neutrality is obsolete. Thus it appears that Mr. Borchard is fundamentally in disagreement with the conduct of our foreign affairs since 1914. There are many errors of policy in the Neutrality Act of 1937. Revision of this Act by the next Congress is predicted. "Congress should either (a) repeal the entire Act and depend on the rules of international law, the existing neutrality statutes and the constitutional duty of the President not to involve the United States in a foreign war, or (b) reserving to itself, with the President, the privilege of determining the existence of a 'state of war,' Congress should retain the present Act, amending it in the particular above mentioned only [by Professor Borchard]. The second alternative is preferable." It will be interesting to watch whether Congress say yes-yes to this program.

LABOR RELATIONS

What Is Employer Domination or Support? Lewis H. Van Dusen, Jr., 13 Temple L. Qu. 63. (N. '38, Philadelphia, Pa.)

The intricacies and the refinements of the National Labor Relations Act and its interpretations are exceeded by the bitter passions that have been aroused over its administration. The truth concerning the whole subject-matter is obscured by the propaganda that appears over and over in what is called our free press, i.e. free to express in news columns the prejudices of the owners who frequently are not gifted with intellectual honesty or, at least, with objectivity. The latter quality is too rare, but Mr. Van Dusen's long analysis seems to merit that distinction. Nearly forty pages are devoted to what, after all, is only one phase of the Commission's work and this again proves that the labor relations problem is unusually complicated. Perhaps the Board will think that there are more critical comments than a fair man could write; but by comparison with many other discussions, at least, the present article is a mild and calm statement. Probably the most valuable part of the discussion is the analysis of the opinions of the Board rather than the decisions of reviewing courts on the question under consideration. The burden of the criticism that is offered seems to be the weakness of the Board for using not only hearsay but remote hearsay very freely and then drawing conclusions from evidence that courts would spurn as a justification for determination of serious controversies.

PUBLIC LAW

Interstate Comity and Governmental Claims, F. Arnold Daum, 33 Illinois L. Rev. 249. (N. '38; Chicago, Ill.)

Sovereign independent nations will not enrich other nations by enforcing governmental claims. To what extent should the states which compose the United States be governed by the same rule? The answer found in this brief, concise article is divided into (1) extrastate enforcement of judgments founded on governmental claims and (2) extrastate enforcement of governmental claims not reduced to judgment. The rule established in the Pelican case was a refusal by the United States Supreme Court to enforce a judgment for Wisconsin for penalties assessed for a violation of a regulatory statute. This decision was thought to apply to a judgment for taxes and the A.L.I. apparently was content. Recently, however, a judgment for a tax in one state was enforced in another state and the U. S. Supreme Court also has held that full faith and credit is not given unless this is done. In view of this advice, there is now hope that adverse decisions will be overruled or distinguished and that in the future the United States Supreme Court will hold that the full faith and credit clause requires the enforcement by state A of the rights arising out of the tax statutes of state B. Certain objections to such a rule are examined and believed to be insufficient.

UNLAWFUL PRACTICE

Insurance Trusts, Insurance Agents, and the Practice of the Law, Albert Epstein, 72 U. S. Law Rev. 499 (S. '38; New York City).

Something should be done to halt insurance agents from "dispensing legal advice and services with all the aggressiveness for which their calling is proverbial." It may well be that such an effort will not be entirely resisted by insurance executives and insurance counsel. The recent trend away from the payment of life insurance in lump sums and in favor of deferred payments has brought forth the practice of insurance "wills" or "trusts." These involve, frequently, complicated arrangements that require, for the sake of accuracy, expert knowledge of the law of insurance contracts, wills, trusts, taxation, and future interests. The average lawyer is hardly competent in these difficult and specialized fields and it is a rare insurance agent who has the competency. He makes use of forms secured from the home office and sometimes executes documents that have given grief to the company's counsel when he finds what has happened. Frequently the intention of the insured is not effected. It seems remarkable that these forms commonly have been prepared by non-legally trained clerks and that insurance counsel in the past frequently have not been asked to approve an insurance trust before it is accepted. More recently insurance companies have become more acutely aware of what they are being committed to by their agents. Some companies have adopted restrictive measures. But the problem of unlawful practice of the law has not been wholly solved by such restrictions.

FEDERAL ADMINISTRATIVE AGENCIES

(*Continued from page 32*)

patrons of the postal service charging that some individual or concern is using the mails to defraud. Such complaints are referred to the Chief Post Office Inspector, who assigns them to an inspector for investigation. When the investigation is completed, if the scheme is one for obtaining money or property through the mails by means of false or fraudulent pretenses, representations and promises, in other words a 'mail order' scheme, or is a continuing lottery, in addition to presenting the evidence to the United States Attorney for consideration of criminal prosecution, the inspector may submit the evidence through the Chief Inspector to this office for consideration of the institution of so-called 'fraud order' proceedings. When the evidence is received here, it goes to the fraud section of this office and is there assigned to an attorney for study. In the event it is concluded that the evidence makes it a prima facie case under the statutes, a memorandum of charges is prepared, somewhat in the nature of an indictment, specifying wherein the scheme is alleged to be in violation of the statutes. These charges are signed by the attorney in charge of the fraud section and are addressed to the Solicitor. Thereafter the Solicitor, if upon the face of the charges the matter appears to be one warranting action, issues a citation calling upon the concern or individual charged to show cause, usually thirty days thereafter, why a fraud order should not be issued. This citation, with a copy of the charges and of the statutes, is personally served upon the concern or individual charged through the postmaster at the place where the scheme is operated."

19. *Power.* (*a*) The Federal Power Commission, organized under the Water Power Act of June 10, 1920, regulates the distribution of water power available from sites on public lands, government reservations, and navigable waters.[46] The Federal Power Act of Aug. 26, 1935, enlarged the scope of its work, and a further enlargement was made by the Natural Gas Act of June 21, 1938. It issues and revokes licenses for the use of power and regulates the business of selling electric energy in interstate commerce including rates, services, and finances, and regulates rates and services in the transportation of natural gas. It makes its own rules of practice (sect. 213). In the conduct of hearings "the technical rules of evidence need not be applied"; and its findings of fact "if supported by substantial evidence shall be conclusive."[47]

(*b*) The Tennessee Valley Authority was organized under the Act of May 18, 1933 (Pub. No. 17, 73d Cong.), to construct and operate dams, etc., on the Tennessee River and its tributaries, for the control of floods and the production of power. It has a corporate name and seal, and may contract, purchase property, exercise the power of eminent domain, issue bonds, and sell power, fertilizers, etc. But it has held no hearings under the statute, and therefore has had no occasion to promulgate rules of procedure.

20. *Public Health.* The *Food and Drug Administration* (in the Department of Agriculture) enforces the Food & Drugs Act, the Tea Act, the Naval Stores Act, the Insecticide Act, the Import Milk Act, the Caustic Poison Act, and the new Food, Drugs and Cosmetics Act (which supersedes the Food and Drugs Act of 1906 but does not take effect until June 20, 1939).

The practice of the Bureau in the enforcement of all of these Acts, before certifying the case to the Department of Justice recommending prosecution, is to give the person charged an opportunity for a hearing. But the hearing is informal (in person, or by letter, or by attorney), and no rules of procedure have been announced. The regulations of the Secretary for the procedure of inspection of merchandise and collection of evidence, however, are elaborate, and vary of course with the article that is the subject of the law.[48] Moreover the enforcement of these Acts in the entry and release of imported goods involves informal hearings, fully covered by the regulations. But several of the Acts allow seizure of illegal merchandise shipped in interstate commerce, followed by condemnation proceedings "in rem," and the Bureau does not hold hearings in such cases.

Of course, the new Food, Drugs and Cosmetics Act (§§304, 505, 701) provides carefully for judicial review of the Secretary's rulings; in review of these rulings, his findings of fact "if supported by substantial evidence shall be conclusive" (§§505, 701), and in prosecutions or condemnations jury-trial is demandable.

21. *Public Lands.* In the Land Office (Department of the Interior), the jury-trial rules nominally are not in force by regulation.[49] Nor do the Courts apparently regard the jury-trial rules as binding on the Land Office;[50] and only occasionally do the Office decisions find it worth while to invoke them.[51]

46. The history and scope of this Commission is given in the following: Milton Conover, The Federal Power Commission (Service Monograph No. 17, Brookings Institute for Government Research, Washington, 1923).

47. Federal Power Commission: Rules of Practice and Regulations, June 1, 1938. Provisional Rules of Practice and Regulations under the Natural Gas Act; July 11, 1938. These regulations contain a few rules about documents, depositions, etc. They are excellently formulated and decimally numbered (like the Civil Aeronautic Regulations), conformably to the system adopted by the Interdepartmental Committee for the future United States Code of Federal Regulations, in its order of June 1, 1938.

The Rulings, Opinions, and Decisions are published in individual mimeograph releases, and are collected later in printed volume form (Vol. I, 1939).

48. Service and Regulatory Announcements: Regulations for the Enforcement of the Tea Act (dated April, 1931), the Caustic Person Act (dated Jan. 1929), the Naval Stores Act (dated July 1938), the Import Milk Act (dated July 21, 1927), the Insecticide Act (dated Oct. 1928), and the Food and Drugs Act of 1906 (dated Nov. 1930).

A new set of such regulations for the enforcement of the Food, Drugs, and Cosmetics Act of 1938, is in draft, published in mimeograph. By § 305 of that Act, the Secretary is required to give a hearing before recommending any case for prosecution, and the draft rules provide for such a hearing.

49. Rules of Practices in Cases before the U. S. District Land Offices, the General Land Office, and the Department of the Interior, with Amendments to Sept. 1, 1926, Washington, 1926 (a few fundamental rules are prescribed, including the right of cross-examination, etc., Rules 20-41).

50. 1894, Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036 (land-office cancellation of entryman's certificate; held, "there is nothing in the point that there was no evidence before the commissioner that the entry was fraudulent, or at least no competent evidence; the Courts cannot review the decisions of the land department on the ground that the evidence was insufficient, or that only incompetent evidence was before it; the power to try questions of fact necessarily embraces the power to pass upon the weight and competency of evidence"; 1937, U. S. Standard Oil Co., D.C.S.D. Cal., 20 Fed. Suppl. 427 (land-grant; rulings of the Secretary of the Interior"; the

Considering the extent and variety of administrative adjudication on record in this Office, and the vast interests involved in them, there seems to be a lesson to be learned from the comparatively few instances of controversy arisen over its procedure and its rulings. Evidently it is practicable for an administrative department under some conditions to conduct its proceedings in a manner that minimizes technicality and yet gives fair and satisfactory treatment to all parties. Possibly age and experience (a common feature of this Office, the Patent Office, and the Interstate Commerce Commission) have something to do with this result.

22. *Reconstruction Loans, Public and Private*

(*a*) The *Reconstruction Finance Corporation* operates under the Act of Jan. 22, 1932 (Pub. No. 2, 72d Cong.) and a dozen or more amendatory Acts. Its purpose is to aid in financing agriculture, commerce, and industry, by various expedients, chiefly by loans. But it has had no occasion to promulgate rules of procedure or to make rulings or decisions on claims or complaints.[52]

(*b*) The *Federal Emergency Administration of Public Works* (WPA) was first established under the Act of June 6, 1933 (Pub. No. 67, 73d Cong.; National Industrial Recovery), extended by later legislation. Its duty involves loans and grants to promote public works programs. It is authorized to make investigations and hold hearings; but its hearings are informal, and when its decision is disagreed with by the claimant, the claim is referred to the Comptroller General for settlement.

Its regulations consist mainly in prescribing the terms under which contractors are to perform the works undertaken.[53]

23. *Securities.* The Federal statute of May 27, 1933 (cited as Securities Act of 1933) aimed "to provide full and fair disclosure of the character of securities sold," and "to prevent frauds" in such sales; it placed the administration of the specific rules in the hands of the Federal Trade Commission, but it also created civil liabilities to parties injured, justiciable in the Courts. The statute of June 6, 1934, (amended later by St. 1936, May 27, and by St. 1938, June 25) provided further for the regulation of exchanges and markets dealing with securities, was therefore entitled Securities Exchange Act of 1934, established a new body, the *Securities and Exchange Commission,* and to this body transferred and consolidated the administration of both Acts. The statute of August 26, 1935, provided for the regulation of public utility holding companies, and placed the administration of this Act also in the hands of the Securities and Exchange Commission.

Under all three Acts the Commission is authorized to make its own regulations; and the findings of fact reached at its hearings "if supported by evidence shall be conclusive" (in the Acts of 1934 and 1935, "by substantial evidence"). The Acts make no provision for rules of evidence, except the standard ones about subpoenas, depositions, and the privilege against self crimination.

The Commission therefore issues three sets of regulations, one for each of the three Acts.[54] But these regulations deal only with the details of the transactions required by the Acts to be conducted in a manner conforming to the law. The procedure at hearings is governed by Rules of Practice;[55] these Rules provide for the registration of persons appearing, as attorneys for parties, together with a few standard rules for depositions, documents, subpoenas, and objections.

24. *Shipping.* Under the Shipping Act of Sept. 7, 1916, regulating carriers by water, unjust practices by carriers in respect to rates and services (Sections 14 to 18) were forbidden, and the administration of these provisions was placed in the hands of the United States Shipping Board, later made a Bureau in the Department of Commerce.[56] These powers were by the Act of June 29, 1936 (Merchant Marine Act of 1936) transferred to the United States Maritime Commission, an independent body.

The Board, for its proceedings in dealing with complaints of unlawful practices, made its own rules of procedure, which contain only a few standard provisions aboût subpoenas, depositions, and documents.[57] These rules, in revised form, have been carried over for practice under the Commission.

25. *Trade.* The *Federal Trade Commission,* administering the statutes dealing with unfair methods of competition and unfair or deceptive practices, is author-

Department of the Interior is not bound by judicial rules of evidence; * * * the disregard of the ordinary rules of evidence, even of their violation, except in the instances already mentioned, is not a ground for review even in case of bodies of more limited power."

51. The following are gleaned from a few volumes taken casually: 1895, Peacock *v.* Shearer's Heirs, 20 Dec. Public Lands p. 213 (survivor's testimony to deceased opponent's admissions); 1900, Burton *v.* Howe, 29 Dec. Public Lands p. 581 (depositions taken by one party may be used by the other); 1914, Sarah Merkle's Case, 19 Dec. Pension and Bounty-Lands p. 181 (presumption of death after 7 years).

The rulings were published originally in Decisions relating to Public Lands, now in a new series entitled Decisions of the Department of the Interior in Appealed Pension and Bounty Land Claims (usually cited P. D.); vol. 56 in 1938; the rulings are made by the Assistant Attorney-General for the Interior Department, and on a few subjects—*e.g.* marriage—there is a close adherence to the jury-trial rules; but no general or automatic application of the body of rules is apparent.

The history and scope of this Office is given in the following: Milton Conover, The General Land Office (Service Monograph No. 13, Brookings Institute for Government Research, Washington, 1923).

52. It publishes Circulars (No. 1, etc.) telling how to apply for loans, and a pamphlet of August, 1938, containing the text of all applicable laws.

53. Terms and Conditions (Sept. 15, 1937). Principal Acts and Executive Orders pertaining to Public Works Administration (July, 1938).

54. General Rules and Regulations under the Securities Act of 1933 (April 1, 1938). General Rules and Regulations under the Securities Exchange Act of 1934 (Sept. 10, 1938). General Rules and Regulations under the Public Utility Holding Company Act of 1935 (July 1, 1938).

55. Rules of Practice as amended June 25, 1938.

The orders, findings, and opinions are issued in mimeograph as soon as made. Orders of general scope are printed also in the Federal Register. Findings and opinions are published in printed volumes from time to time; Vol. I, Securities and Exchange Commission Decisions, covers July 2, 1934-Dec. 31, 1936.

The Commerce Clearing House Co. furnishes a Securities Act Service, with regulations, opinions, forms, etc.

The following opinion has passed upon the Commission's rules: 1938, Woolley v. U. S., 9th C. C. A., 97 Fed. 258 (the Commission is not constrained by technical rules as to the admissibility of evidence).

56. The history and scope of this Board is given in the following: D. H. Smith and P. V. Betters, The United States Shipping Board (Service Monograph No. 63, Brookings Institute of Government Research, Washington, 1931).

57. Rules of Procedure before the United States Shipping Board Bureau (revised to June 28, 1935).

The rulings of the Board were published in printed separate leaflets, and this practice has been continued by the Commission; each ruling being identified by its docket number (continuous under the Commission) and the names of the parties; by 1938 there were about 100 in all. These leaflets, however, are paged continuously (page 749 on July 7, 1938), and will form vol. 1 of the Reports when reprinted and bound.

ized by the organic statute (1914, Sept. 26, § 6) "to make rules and regulations for the purpose of carrying out the provisions of this Act," and its findings of fact "if supported by evidence shall be conclusive."[58] Its regulations contain a few fundamental provisions as to subpoenas and depositions (Rules XVI-XIX), and do not profess to adopt formally the jury-trial rules as to admissibility,[59] although they are usually applied in a liberal spirit.[60]

26. *Transportation.* The *Interstate Commerce Commission* presides over a vast practice, handled almost entirely by professional lawyers; and no doubt the appropriate jury-trial rules for its special kinds of issues are commonly and instinctively observed in principle. But its decisions reveal relatively little controversy that turns on those rules.[61] Nor do the Federal Courts deem that the Commission is bound in law to follow that body of rules as such; although occasionally, where an important controversy turns essentially on the observance of some fundamental rule of fair and thorough inquiry, there appears a disposition to scrutinize the Commission's observance of it.[62]

27. *War Veterans.* The various beneficial services provided by Federal statutes for war veterans—pensions, medical care, insurance, widows and dependents, etc.—are administered by a board entitled *Veterans Administration.*[63] Within the staff of this board is organized an elaborate system of initial and appellate stages of investigation, hearing, appeals and final decision. The organic Act authorized a liberal principle for making proof; the Director makes rules "for the nature and extent of the proofs and the evidence, provided that due regard shall be given to lay and other evidence not of a medical nature."[64] But the Federal Courts, when reviewing the rulings of the Board, have shown a tendency to be over-strict in applying some of the jury-trial rules,—notably the rule about opinions as to permanent disability.

28. *War-Time Boards.* The World War produced a vast volume of disputes calling for administrative adjudication, now obsolete, both during and since the period of hostilities.

The awards of the *National War Labor Board* represented an effective adjudication of controversies having convulsive possibilities, but were conducted upon simple and direct methods without insistence upon jury-trial rules.[65]

The *Board of Contract Adjustment* was vested with powers to adjudicate upon post-war claims mounting into billions of dollars, and its volumes of opinions expounding the findings of fact and law are models of clarity and directness,—refreshing in their contrast to the futile display of technique upon Evidence rules so often seen in the opinions of Supreme Courts upon everyday cases of mercantile disputes over broken contracts.[66]

Conclusion. It would seem likely from the latest opinion of the Federal Supreme Court, that the statutory expression "the Board's findings of fact, if *supported by substantial evidence,* shall be conclusive," will ultimately serve to ensure a satisfactory degree of proof, and satisfactory modes of eliciting evidence, as a standard to be applied to all these administrative agencies, without imposing upon them a strict and needless adherence to the detailed jury-trial rules of Evidence:

1938, Dec. 5, HUGHES, C. J. in Consolidated Edison Co. National Labor Relations Board, —U. S. —, 59 Sup. —: "The companies contend that the Court of Appeals misconceived its power to review the findings and instead of searching the record to see if they were sustained by 'sub-

(*Continued on page 76*)

58. The regulations are published in a volume entitled Federal Trade Commission; Rules of Practice, Statement of Policy, Acts of Congress etc. (May 21, 1938).

The rulings are published in Federal Trade Commission Decisions (vol. 21 in 1938, covering January 1936).

The Commerce Clearing House Co. has a Trade Regulation Service, reporting all the Federal trade regulation statutes, judicial decisions, commission rulings, and administrative orders, with digests and indexes.

59. G. C. Henderson, "The Federal Trade Commssion" (1924; "As far as I have been able to find, the Commission itself has never refused to give effect to testimony on the ground that it is technically incompetent, nor have questions of Evidence played any part in the case on appeal"); Bene & Sons Co. *v.* Federal Trade Com. (1924), 299 Fed. 468; Arkansas Wholesale Grocery Ass'n., Federal Trade Com. (1927), 18 Fed. 2d 866.

60. A valuable study of the practice of the Commission in dealing with those kinds of evidential material most commonly involved is the following: John W. Norwood, "The Reception of Evidence for the Federal Trade Commission" (mimeograph; available for attorneys engaged in cases before the Commission, and used more or less by other agencies as a guide).

61. H. C. Lust, Digest of Decisions under the Interstate Commerce Act, 1913 ff.; Interstate Commerce Reports (vol. 227 in 1938).

"It is perhaps not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of Evidence applying to the introduction of testimony in courts" (22d Annual Report of the Commission, p. 10).

"It is the general opinion of those who have had experience in practice before the Commission that its usefulness would be greatly interfered with if it enforced the rules of evidence generally recognized in the courts. Particularly would it be next to impossible for parties to present their cases fully if each witness was required to have personal knowledge of the many statements and facts which are usually introduced into the record for the Commission's information. While it is true that a great deal of irrelevant matter and incompetent testimony are introduced into the ordinary record made before the Commission, yet the Commission has become so expert in separating the wheat from the chaff that the introduction of this irrelevant and incompetent evidence does not ordinarily interfere with the doing of substantial justice." (1923, Robert V. Fletcher, The Interstate Commerce Commission, in "The Growth of Administrative Law," St. Louis Bar Assn', p. 67).

In the original Rules of Practice (Reports, Vol. I, App. I), no reference was made to the jury-trial rules. In the present Rules of Practice before the Commission (with forms; revised to April 1, 1936), there are a few Rules as to examination of witnesses, burden of proof, depositions, subpoenas, documents, etc. (Rules X-XIII). Under the Motor Carrier Act of 1935, special supplementary rules have been issued, in mimeograph, to Jan. 22, 1937, and May 31, 1938.

The history and scope of this Commission is given in the following: Joshua Bernhardt, The Interstate Commerce Commission (Service Monograph No. 18, Brookings Institute for Government Research, Washington, 1923).

62. The Supreme Court's opinions, too numerous for citation here, begin at I. C. C. *v.* Baird, 194 U. S. 25 (1903) and extend to U. S. *v.* Abilene & S. R. Co., 265 U. S. 274 (1924).

63. The history and scope of this Bureau is given in the following: G. A. Weber and L. F. Schmeckebier, The Veterans Administration (Service Monograph No. 66, Brookings Institute for Government Research, Washington, 1934).

64. St. 1930, July 3, §849, amending U. S. Code 1926, tit. 38, §426; St. 1933, Mar. 20, 73d Cong. P. C. No. 78; Executive Order 6230, July 28, 1933 (printed in U. S. Code Compact Ed. Pamphlet No. 5, May 1934, p. 63, appended to Code 1926, tit. 38, §723), Part III, par. V, sub-sect. *e*; Special Review Boards of the Veterans Administration, "The Board will give due consideration to lay evidence as well as medical evidence of record, bearing in mind that * * * the weight to be given to the evidence must depend largely upon the knowledge and capacity of the individual giving the testimony."

65. National War Labor Board, Report of the Secretary to May 31, 1919; Abstract of Awards, by Robert P. Reeder (1920); and later volumes.

66. Decisions of the War Department Board of Contract Adjustment (vol. I, 1919, and later).

COMMITTEE INTERVENES TO PROTECT RIGHTS OF ASSEMBLY

(*Continued from page* 12)

the guarantees of the First Amendment within the purview of the Fourteenth), the Supreme Court made a decision on the subject of speaking in parks without a permit, which the defendants claim is favorable to their contention in the case at bar. *Davis v. Massachusetts, supra.*

In that case a Boston ordinance forbade speaking on the Common without a permit. Davis considered that the city had no right to require permits for religious services on the Common, which had formerly been unrestricted. Accordingly he proceeded to preach without asking for a permit. His conviction for violating the ordinance was upheld by the highest court of Massachusetts in *Commonwealth* v. *Davis,* 162 Mass. 510, 39 N. E. 113 (1895). Mr. Justice Holmes, then on the Massachusetts court, wrote the opinion. Davis carried the case to the Supreme Court of the United States where the conviction was sustained. We believe, however, (1) that this case is clearly distinguishable in respect of the issue involved, and (2) that the rationale of the case is opposed to the doctrine of later decisions of the Supreme Court.

(1) The facts in the *Davis* case were quite different from those in the case at bar. Davis spoke without a permit and without applying for one, thus completely disregarding the Boston ordinance. The present plaintiffs have, however, not disobeyed the Jersey City ordinance. They sought a permit in accordance with its terms, and it was only when that permit was refused that they took legal proceedings to modify the manner in which the city officials were administering the ordinance. Therefore, although the *Davis* case might be cited in support of the validity of the Jersey City ordinance on its face, or perhaps in support of the punishment of the present plaintiffs if they had spoken without a permit, the *Davis* case did not deal with the question whether an applicant for permission to speak was rightfully denied a permit, which is the issue before this court.

Furthermore, the *Davis* case did not involve any contention that the *administration* of the ordinance was discriminatory; and there was in that case no evidence of discrimination. In the case at bar, the record shows discriminatory administration of the ordinance through the refusal of permits to persons who represent unpopular causes, while permits were in the same period granted to others.

Even though an ordinance is constitutional on its face, its discriminatory administration may be enough to violate the Fourteenth Amendment. Of the numerous cases on this point it seems sufficient to refer to the opinion of Mr. Justice Matthews in *Yick Wo. v. Hopkins,* 118 U. S. 356, 373-374 (1886):

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

As already indicated, the question in the case at bar is not the constitutionality *on its face* of the ordinance requiring applications for permits. The reasonableness of a requirement that a permit be applied for, where the ordinance is not void on its face, was recognized in *Smith v. Cahoon,* 283 U. S. 553 (1931), and in *Lovell v. Griffin* (at p. 452), *supra.* But the question here is as to the unconstitutional *administration* of the ordinance by reason of the arbitrary and discriminatory conduct of the defendant officials. This is a feature which was in no way involved in the *Davis* case. Finally, the *Davis* case was decided long before the Supreme Court declared the modern doctrine of protection of liberty of speech and assembly against state and municipal restrictions. In the opinion in the *Davis* case it will be observed that there is virtually no discussion of such liberties. Davis asserted that he had some kind of property in the Common, of which the ordinance deprived him, and Mr. Justice White easily disposed of this claim. Since the state of the authorities in 1897 gave very little indication that freedom of speech and assembly were protected at all by the Fourteenth Amendment, what the Supreme Court said in the *Davis* case needs to be critically re-examined in the light of such modern decisions as *Lovell v. Griffin* and *De Jonge v. Oregon* (*supra*). See Section II of this Brief.

(2) Although the result of the outmoded *Davis* case is distinguishable, the defendants may rely on some of its language as favorable to their contention in the case at bar. Thus Mr. Justice Holmes said (162 Mass, at 511, 39 N. E. at 113):

"For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by puting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes."

Mr. Justice White, besides quoting Mr. Justice Holmes as above, also said (167 U. S. at 48):

"The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[8]

Thus, Mr. Justice White's reasoning was in substance: (a) The city has title to the Common; (b) title to property involves the right to exclude all persons from it, there being no difference in this respect between public and private property; and (c) the "greater" power to exclude all persons unconditionally, implies the "lesser" power to impose any condition whatsoever on the use of the property.

Passing for the moment the first two steps, we submit that the third—the so-called doctrine of "greater and lesser powers"—has been repudiated in a number of more recent Supreme Court decisions from 1898 down to December, 1938.

Beginning with *Blake v. McClung,* 172 U. S. 239 (1898), the Court has developed the doctrine of so-called unconstitutional conditions, which, as the dissent

8. Judge Bodine makes the same argument in the above mentioned New Jersey suit brought by Norman Thomas against the present defendants. *Thomas* v. *Casey,* 1 A. (2d) 866, 870 (1938). In his opinion Judge Bodine said: "He [Thomas] has no more right to speak in public places in that city, such as highways and parks, without permit than he has to invade a citizen's home without invitation."

of Mr. Justice Holmes pointed out in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 (1910), is logically incompatible with the doctrine of "greater and lesser powers." Thus although a state has the "greater" power to exclude from intrastate business all companies incorporated elsewhere, it does not possess the "lesser" power of admitting them on condition that they pay an otherwise unconstitutional tax, *Western Union Telegraph Co. v. Kansas, supra,* or agree to abstain from resort to the federal courts. *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922).

The Court has not hesitated to hold unconstitutional even conditions placed by the State on the use of its own property. Thus, *Frost Trucking Co. v. Railroad Commission of California*, 271 U. S. 583 (1926), held invalid a state statute which required all public carriers to obtain certificates of convenience and necessity as a condition of using the public roads. Even more striking is *Missouri ex rel. Gaines v. Canada*, decided December 12, 1938 (U. S. Law Week, December 13, 1938, p. 459), the most recent case in which the Court has declined to apply the doctrine of greater and lesser powers. The question there was whether a state may furnish law school facilities in a state university to white students while denying them to colored students. As the dissent said:

"Under the opinion just announced, I presume she [the State of Missouri] may abandon her law school . . ."

And as the Chief Justice, speaking for the majority, stated:

"The question here is not of a duty of the State to supply legal training, . . . but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right."

The Court held that, although the State and the State University which is its agency have the power to refuse to devote public property to use as a law school, they do not have the "lesser" power to allow it to be used by white law students only.

It is submitted, therefore, that the third step of Mr. Justice White's reasoning in the *Davis* case is no longer law in view of the authorities just cited.

In addition to the erroneous assumption that a greater power necessarily includes a lesser one, another essential error inheres in the second step of Mr. Justice White's reasoning, viz., in the assumption that a city "owns" its parks in the same sense and with the same rights as a private owner owns his real estate.

Despite the eminence of the judges who have used this argument, we submit that it is not a correct conception of the relation of a city to its parks in respect to their availability for public meetings. It is untenable to assert that a city "owns" its parks in the same way that a man owns his house, with the right to exclude or admit anyone he pleases. The parks are held for the public. A man's house is primarily for himself and his family, and if he chooses to admit strangers, that is his incidental right. But the primary purpose of a park is to provide generally for the use and recreation of the people. . .

Accordingly, while it is doubtless true that a city can regulate its property in order to serve its public purposes, there is, we submit, a constitutional difference between reasonable regulation and arbitrary exclusion. In short, the right of a city in respect of its parks resembles other governmental rights in that it must be administered for the benefit of the public and not in an arbitrary manner. There are many different kinds of public benefits to be derived from parks, and one of the most important is the constitutional right of assembly therein. The parks are held by the city subject to this right. It can be regulated in a reasonable manner; it must not be denied. To the extent that the rationale of *Davis v. Massachusetts* is inconsistent with this doctrine, we submit that it is no longer good law.

The danger of the private ownership theory of public property, represented by *Davis v. Massachusetts*, becomes particularly impressive at a time like the present when acquisitions of large amounts of property are being made by government and it is carrying on enormous activities, such as those conducted by the Tennessee Valley Authority. If these properties can be administered with the arbitrary powers to exclude anybody who happens to be disliked by officials or politically influential groups, then those who oppose the governmental policies of the moment would find many aspects of their lives at the mercy of a property owner (nation, state or city), possessed of vast and arbitrary power. . .

The true analogy to government ownership of parks and other property dedicated to public uses is furnished by a public utility, which must give service to all so long as this is consistent with the performance of its functions. It can regulate, but not discriminate. It can refuse to deal with those who interfere with its functions or with other users of its service, or when the available services are exhausted. We already recognize this principle as applied to governmental substitutes for private utilities. Thus a municipal street railway can eject "drunks" and set a limit on overcrowding, but nobody contends that it can refuse to transport members of unpopular groups even if other passengers express a dislike for them.

In the same way, the parks can be regulated in a manner consistent with their purposes, one of the most important of which is the right of free assembly therein for public discussion at reasonable times and places. Disorderly persons can be excluded, because they interfere with peaceable users of the parks like drunks in the municipal trolley car. Open-air meetings can be assigned to a particular park or a particular area, just as passengers can be assigned to particular seats or told to move away from the door. If all the available space is occupied and there is no more room for meetings, permits can stop, just as a full municipal street car can refuse to take on passengers. But we submit that law-abiding Democrats or Republicans or Communists or unionists or members of the American Civil Liberties Union can no more be constitutionally kept out of empty park spaces reasonably suitable for open-air meetings than they can be ejected from an empty municipal trolley car, or be refused current from a municipal power plant.

In sum, a city is required to furnish its municipal services to all, subject only to reasonable rules. Surely this principle is no less applicable when those services include the making available of space for open-air meetings, in pursuance of the right of assembly that is guaranteed by the Constitution of the United States.

The basis of the right of assembly is the substitution of the expression of opinion and belief by talk rather than force; and this means talk for all and by all. . .

[The brief continues with the statement that the decree is sound in its provisions as to public meetings and that its provisions in this respect are appropriate and necessary to preserve constitutional rights. It ends with the

following summary of the argument and its conclusions.]

Summary and Conclusion

We have undertaken to show that the course of conduct of the defendant officials of Jersey City that is forbidden for the future by the decree, is violative of one of the most valuable and necessary American rights—the right of free discussion in open-air meetings held for lawful purposes.

The findings of fact show a deliberate policy of the Jersey City officials to discriminate against the C. I. O. and the American Civil Liberties Union and in one way or another to prevent the public expression of their ideas in Jersey City.

This suppression is sought to be justified under the plea of the maintenance of public order. But we have shown that the excuse is specious; that if allowed it would place precious rights of free speech and assembly at the mercy of any reckless faction; and that, as the decree provides, such threats of disorder as appear here must be met by providing police protection, to the end that the constitutional rights of Americans shall not be sacrified to intimidation.

The suppression is also sought to be justified by invoking a decision of Mr. Justice White over 40 years ago. *Davis v. Massachusetts, supra.* But we have shown that the case is different from the one at bar and further that the alleged implications of the decision are completely out of harmony with the whole modern trend of decision in the Supreme Court that has given a wide scope to the rights of free speech and assembly and set up strong safeguards against their impairment. Mr. Justice White quoted a statement by Mr. Justice Holmes in the Massachusetts court. But it is indeed ironical that a statement of Mr. Justice Holmes, who stood so firmly for the tolerance of unpopular views and the protection of free expression, should be adduced by the defendants in support of so ruthless a denial of the right of assembly as appears here; and it is hard to believe that Mr. Justice Holmes, if still on the Bench, would approve the use of his statement in *Commonwealth v. Davis* to justify the conduct of the Jersey City officials.

In conclusion, we wish to stress the denial of the right of assembly that is forbidden by the decree of the District Court as *essentially a manifestation of intolerance.* Nothing can be clearer than that it was solely because the views of the C. I. O. and Civil Liberties Union and of their speakers were unacceptable to the authorities of Jersey City, that they took their drastic steps to deny to the plaintiffs the right to conduct the public meetings which they sought to hold.

It is because of the striking example of ruthless intolerance afforded by this case that it is so significant for the future of American civil rights. For tolerance is of the essence of the American system and of the American way of life—not only tolerance in matters of religion, but also tolerance in matters of political, economic and social belief; tolerance not only of views that we can approve, but also (as Mr. Justice Holmes himself said) of views that we hate; tolerance not only of views that accord with our interests but also of views that are inimical to our interests.

In the long run, a system of government and a way of life resting, as does ours, on the consent of the majority can survive only if we support tolerance and free discussion within wide limits. The law alone cannot instill that degree of tolerance upon which our institutions rest. Only education and a widespread

understanding of the essentials of free government can do that. But the courts can, in concrete cases, aid in preserving free institutions by forbidding definite acts that suppress lawful free expression.

The present case is of that character. The plaintiffs were doing nothing more than to invoke their American constitutional right "peaceably to assemble." The findings of fact show a deliberate effort to suppress the exercise of that right. The grounds upon which the suppression is sought to be justified are specious and insufficient. The provisions of the decree are no more than what is required to vindicate the rights that have been denied.

The Committee submits that the provisions of the decree of the District Court with regard to public meetings should be affirmed.

Respectfully submitted,

THE SPECIAL COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION,

DOUGLAS ARANT,
(of the Alabama Bar)
ZECHARIAH CHAFEE, JR.
(of the Rhode Island Bar)
GRENVILLE CLARK,
Chairman
(of the New York Bar)
OSMER C. FITTS
(of the Vermont Bar)
GEORGE I. HAIGHT
(of the Illinois Bar)
MONTE M. LEMANN
(of the Louisiana Bar)
JOHN FRANCIS NEYLAN
(of the California Bar)
JOSEPH A. PADWAY
(of the Wisconsin Bar)

The members of the Committee.

Federal Administrative Agencies

(*Continued from page 72*)

stantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive', means supported by substantial evidence. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the Court referred to substantial evidence.

"The companies urge that the Board received 'remote hearsay' and 'mere rumor'. The statute provides that 'the rule of Evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules, so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

"Applying these principles, we are unable to conclude that the Board's findings in relation to the matters now under consideration did not have the requisite foundation."

"Christmas Spirits, 1938" at the Chicago Bar Association

FOLLOWING the good old tradition of masques and revels in the Inns of Court at Christmastide, the Chicago Bar Association presented its 14th annual production of "Christmas Spirits, 1938." The subject this year was "All This, and Heaven, Too!" The scene of the musical satire was the President's "Dream House" at Crum Elbow and Father Divine's Heaven across the river, where a Fish Fry was in progress. The production abounded in goodnatured raillery, good singing and musical hits. All the Roosevelt family, Messrs. Cohen and Corcoran and others in the limelight today, appeared.

Titles of some of the songs were: "He Ain't Gonna Purge No More," "How'dja Like a Heaven?", "So Help Me," "Babies, Just Babies," and "Thanks for the Memory." The book of the show was written by Thomas Robert Mulroy, and he also proved himself a very efficient general director. Lyrics were contributed by John D. Black, George W. Swain, Pressly L. Stevenson, Herbert M. Lautmann, Lewis C. Murtagh, Franklin E. Vaughan, Jesse H. Brown, William Burry, Cranston Spray, Edward H. Levi and Jerome Weiss. Jesse H. Brown was musical director and Chief Lyricist.

The show was a great success at the two performances, on Dec. 12 and 13.

NEW SERVICE TO MEMBERS

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. Where available, please give Supreme Court's docket number, name of case, and, especially if docket number is not given, a word or two as to general subject matter and status of case. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

Woman's Place in the Legal Profession

"The five thousand women who are practicing today have not seen fit to confine themselves to one or two branches of the law; instead they have specialized in every branch and have penetrated all ramifications of law. Look about, you find them engaged as title examiners, claim adjusters, advisers of veteran's bureaus, trial lawyers, conveyancers, district attorneys, assistant district attorneys, and all the other conceivable fields—not to mention the judgeships many now enjoy.

"Today you may go forth and ask your foremost citizen the question: 'What is woman's place in the legal profession?' and he is ready to answer it without hesitation. The answer is, 'Her place is identically the same as man's place'—to render service and uphold justice."—*Laura E. Miller in Kentucky State Bar Journal (March).*

News of the Bar Associations

Missouri Bar Association Follows President Fry's Recommendations for Action in Important Fields—Approves Proposed Constitutional Amendment for Selection of Judges—Addresses Delivered

THE Missouri Bar Association held its 58th annual meeting at St. Louis, September 30-October 1, 1938. Addresses of welcome were delivered by Mayor Dickman for the city of St. Louis and by Roscoe F. Anderson on behalf of the Bar Association of St. Louis. The response to the addresses was made by Mr. Charles L. Bacon.

President W. Wallace Fry thereupon delivered his annual address, Kenneth M. Teasdale, Past President, in the chair. President Fry's address reviewed various important aspects of the Association's activities during the past year and made a number of recommendations. He first called attention to the lack of continuity of work in various committees, on account of the frequent change in membership, and recommended that the Association set up sections to carry on the work of some of the more important committees, so that the program might be continuous and permanent and all members interested in a particular subject or branch of the law might become members of that particular section.

He next took up the Four-Point Program of Legislation recommended by the Interstate Crime Commission in 1935, relating to the act for fresh pursuit of criminals; the revised act for uniform extradition; the revised uniform act relating to out-of-State witnesses; and the act for supervision of out-of-State parolees and probationers. This program he said had been adopted in whole or in part by twenty-six states and he felt it was the Association's duty insistently to demand its adoption in Missouri. He also endorsed the recommendations of the Special Committee on Statutory Revision, Legislative Drafting and Research Bureau, and earnestly urged their adoption as offering a definite and effective method of revision of the statutes in Missouri.

He next called attention to the importance of the development of legal institutes for practicing lawyers and expressed the hope that local, county and circuit bar associations would take advantage of the opportunity to hold legal institutes throughout the State. He also recommended that a special effort be made during the coming year to bring the canons of judicial ethics to the attention of every judge and lawyer in the state, declaring that "we are guilty of hyprocrisy as long as we boast of our canons of ethics and make no effort to apply them to our actions."

HON. INGHRAM D. HOOK
President Mo. Bar Association

He then called attention to the rules of practice and procedure in civil cases for Federal courts, recently promulgated by the United States Supreme Court, and expressed the opinion that if the matter were given intelligent consideration, both lawyers and laymen would see that regulation of practice and procedure by rules of court was worth a trial in State courts. He added that the Supreme Court of Missouri was of course the logical and practical body to make and change the rules of procedure and practice.

He endorsed the cardinal points in the program for the year as set forth by President Frank J. Hogan of the American Bar Association at Cleveland, and proposed that Missouri lawyers cooperate with the American Bar Association and lead the movement to adopt these proposals in Missouri. He also recommended the creation of a special committee on the Bill of Rights, similar to that recently created by the American Bar Association.

He pointed out recent progress in the matter of affiliation of local organizations with the Association and concluded with the declaration that the most important problem before it was to convince the lawyers of the State that the organization was their own and that only through it could anything significant really be accomplished.

At this point the following representatives to the House of Delegates of the American Bar Association were nominated and unanimously elected: Retiring President W. Wallace Fry, Mr. Kenneth Teasdale, and John T. Barker.

Interesting addresses were delivered by R. Allan Stephens, Secretary of the Illinois Bar Association and Chairman of the American Bar Association's Section on Bar Organization Activities, who spoke on "The Lawyer and His State Bar Association"; Dr. Esther Lucille Brown, of the Russell Sage Foundation, who gave her "Impressions of the Legal Profession"; Prof. Edson R. Sunderland, of the Law School of the University of Michigan, whose address dealt with "Rules of Court Governing Practice and Procedure"; Joseph C. Hostetler of Cleveland, Ohio, who spoke on "The Selection of Judges."

At the banquet Assistant United States Attorney General Thurman W. Arnold spoke on "The Enforcement of the Sherman Act," and Hon. Frank J. Hogan, President of the American Bar Association, on "Leadership and Independence of the American Law."

The Association took action with reference to various important committee recommendations, among them those by the Committee on Expediting Trials and Appeals, presented by Judge Lucas of the Supreme Court. This committee recommended the abolition of terms of court, certain provisions with respect to motions for a new trial, the abolition of bills of exceptions and writs of error, and proposed other provisions dealing with appeals, the record on appeal, costs, and grounds for reversal. With a slight change respecting motions for new trial the report was adopted.

The Association adopted the report of the Special Committee on Statutory Revision, Legislative Drafting and Research Bureau recommending legislation creating a legislative reference bureau and making adequate provision

for its operation. A bill prepared by the committee and attached to the report was also approved. The Association also approved the report of the Committee on Amendments, Judiciary and Procedure proposing a constitutional amendment vesting the rulemaking power in the Supreme Court, as proposed by the Missouri Institute for the Administration of Justice, and another constitutional amendment relating to the selection and tenure of judges.

The following officers were elected for 1938-39: President, Inghram D. Hook, Kansas City; Secretary, James A. Potter, Jefferson City; Treasurer, Paul A. Buzard, Kansas City. District vice-presidents — Julius Drucker, St. Louis; R. L. Motley, Bowling Green; Harry Carstarphen, Hannibal; James H. Hull, Platte City; Lee Montgomery, Sedalia; Nick T. Cave, Columbia; Grover C. James, Joplin; Arthur W. Allen, Springfield; A. L. Oliver, Cape Girardeau. The executive committee is composed of Inghram D. Hook, W. Wallace Fry, David Blair, James A. Potter, Paul A. Buzard, George L. Stemmler, and the nine vice-presidents.

State Bar of New Mexico Approves Proposing Constitutional Amendment Providing for Appointive Judicial System, with Provision for Submitting Record to Voters at Fixed Periods—President Fowler Urges Bar to Adopt Militant Attitude

THE annual meeting of the State Bar of New Mexico was held October 14 and 15, 1938, in the district court room at Albuquerque, New Mexico.

President Charles H. Fowler of Socorro, New Mexico, in his address importuned the legal profession to emerge from its long sustained attitude of the defensive and emphasized the importance of taking a more concerted and militant attitude towards its unjust critics. He urged that district judges be relieved of the power and duty of appointing executive and administrative commissions and boards and frowned upon the action of any prosecutor who might withhold evidence which he has in his hands that would be beneficial to a defendant when such prosecutor has cause to believe that the evidence is not available to the defendant.

Ronald J. Foulis of St. Louis, National Chairman of the Junior Bar Conference of the American Bar Association, delivered an address explaining and analyzing the activities of the Junior Bar Conference. He conveyed the greetings of President Frank J. Hogan who was unable to attend.

Hon. Orie L. Phillips, United States Circuit Judge, of Denver, Colorado, was on the program for a paper entitled "The Limit of State and National Power under Recent Court Decisions." Judge Phillips was unfortunately unable to attend the meeting but his address was read in open meeting and is published in the report. Hon. Sam G. Bratton, United States Circuit Judge of Albuquerque, New Mexico, presented a paper entitled "New Rules of Federal Procedure." Hon. A. L. Zinn, Justice of the New Mexico Supreme Court of Santa Fe, New Mexico, delivered an address on "The Modern Merchant of Venice." Mr. Arie Poldervaart, Librarian of the New Mexico Law Library, addressed the meeting on "The Use of the New Mexico Law Library," and Mr. J. R. Modrall of the Albuquerque Bar delivered an address on the subject "Social Security Taxes."

HON. HENRY A. KIKER
President State Bar of N. M.

The Committee on Selection of Judges, of which Judge Sam G. Bratton is Chairman and Judge John C. Watson and Quincy D. Adams are members, recommended, and the meeting adopted, a resolution that steps be taken at the next regular session of the legislature to be held in January, 1939, to propose an amendment to the State Constitution providing an appointive system of selecting judges, with appropriate provision for the submission of the record of a judge to the electors at fixed periods for approval or disapproval.

On motion of A. M. Fernandez, of Santa Fe, a resolution was adopted voicing the disapproval by the State Bar of vesting in the courts and judges thereof the non-judicial powers and duties of appointing executive and administrative boards and commissions and recommending legislation that district judges be relieved of the duty now imposed on them by law of selecting county boards of education.

The Legislative Committee submitted a number of proposed statutory changes, including a revision and codification of the laws relating to the probate of estates; that probate judges should be required to qualify as members of the bar; and that salaries of district judges should be increased to $7500 per year and those of the Supreme Court judges to $9000 per year.

A resolution was adopted expressing regret at the imminent retirement of Chief Justice Andrew H. Hudspeth from our Supreme Court bench and commending him for the splendid public service rendered to the State during his incumbency, on motion of Judge Edwin Mechem of Las Cruces.

A resolution endorsing Judge Sam G. Bratton for appointment to the Supreme Court of the United States was unanimously and enthusiastically adopted.

The entertainment features of the meeting consisted of a luncheon and trip to the State Fair for the ladies; a luncheon in honor of Ronald J. Foulis, Chairman, Junior Bar Conference; and a banquet and dance held at the Alvarado Hotel on the evening of October 15th.

Judge John F. Simms, of Albuquerque, officiated as toastmaster at the banquet. Milton J. Helmick, Judge of the United States Court for China, and formerly a district judge of our State, delivered the main address. Retiring President Fowler and our new President, Henry A. Kiker, also made brief addresses.

The following officers were elected for the ensuing year: President, Henry A. Kiker, Santa Fe; First Vice-President, Edwin Mechem, Las Cruces; Second Vice-President, George L. Reese, Sr., Roswell; Secretary-Treasurer, Herbert Gerhart, Santa Fe.

HERBERT GERHART, *Secretary.*

Oregon State Bar Holds Its Most Successful Meeting—Annual Dues of Members Increased—Law Lists and Directories to Be Restricted to Those Approved by American Bar Association, Etc.

THE Fourth Annual Meeting of the Oregon State Bar was held in Salem, Oregon, on September 29, 30 and October 1. There were registrations of approximately 500 members, making this the best attended convention in the history of the integrated bar, and it was the general opinion that this was the most successful convention ever held by the State Bar.

During the three-day session reports of twenty-two committees were presented and considered, many of which contained recommendations requiring action by the meeting. The most important of these from the standpoint of administration of the State Bar was the report of the Committee on Bar Dues. This report which was overwhelmingly adopted, recommended that the annual dues be increased from $3.00 per year to $6.00 per year.

The Legal Ethics Committee recommended several additions and amendments to the Code of Professional Ethics, all of which were approved and adopted, and a resolution was also adopted recommending to the Supreme Court its approval of the Code of Judicial Ethics heretofore adopted by the State Bar.

The Committee on Law Lists and Directories submitted a canon of ethics in harmony with the American Bar Association's Canons which will have the effect of restricting the law lists and directories in Oregon to those on the American Bar Association's approved list. This canon was approved by the convention.

Other committee reports submitted were those on Reciprocal Relations, Public Relations, Legislation, Legal Education, Board of Bar Examiners, Legal Aid, Notaries Public, Code Corrections and Correlation, Administrative Law, Unauthorized Practice of Law, Retirement of Judges, Judicial Salaries, Selection of Judges, Cooperation with American Law Institute, Selection of Jurors and Necrology.

The guest speakers included two distinguished men of national repute. Colonel O. R. McGuire, chairman of the American Bar Association Committee on Administrative Law, spoke at the Thursday afternoon session on "The Cycle of Government," and at the Saturday morning session Professor Max Radin of the School of Jurisprudence of the University of California spoke on "Pretense and Reality in Our Criminal Law." Both addresses were intensely interesting and enthusiastically received.

One of the best attended features of the convention was a discussion of the Wagner Labor Relations Act by Chris Boesen who upheld the act, and Ralph H. King who took the negative. Both of these speakers, who are members of the Oregon State Bar, have had much practical experience with the operation of the Wagner Act.

Other speakers from the membership of the State Bar were James C. Dezendorf, who delivered an address on "The New Federal Rules of Procedure," Hon. Estes Snedecor, Referee in Bankruptcy, who talked on the recent changes in the National Bankruptcy Act, George Cochran, who spoke on the work of the Federal Commission appointed to study the matter of repayment of construction costs in federal and Indian reclamation projects, and Albert Stephen who delivered his American Bar Association prize-winning essay on "Administrative Law" to a large and enthusiastic audience.

While the Friday morning session was in progress, the applicants for admission to the Bar who had successfully passed the bar examination were sworn in by the Supreme Court, and a feature of the convention was a luncheon tendered by the bar to these new members immediately thereafter. Special luncheons were held on Saturday by the graduates of the three Oregon law schools at separate restaurants.

Contrary to usual procedure the address of the retiring president, Mr. Allan G. Carson, was presented at the Saturday afternoon session, in the course of which Mr. Carson reviewed the work of the many committees of the bar and suggested programs to be followed by such committees in the future. Then followed introduction of Messrs. George M. Roberts, Medford, Robert D. Lytle, Vale, and Lamar Tooze, Portland, newly elected members of the Board of Governors, and Mr. R. R. Bullivant of Portland, the newly elected president, and Mr. Harvey H. De Armond of Bend, the newly elected vice-president. Messrs. Arthur H. Lewis of Portland and F. M. Sercombe of Portland were reelected to the office of treasurer and secretary respectively.

The convention concluded Saturday evening with a banquet and informal dance.

F. M. SERCOMBE,
Secretary.

West Virginia Bar Association Adopts Recommendations for More Efficient Administration—Referendum to Be Had on Bar Integration—Institute on Federal Rules—Canadian Justice Principal Speaker at Banquet

THE fifty-fourth annual meeting of The West Virginia Bar Association was held at The Greenbrier Hotel in White Sulphur Springs, West Virginia, on August 19 and 20, 1938. An innovation was the advancing of the date for the annual meeting from September to August, in order to eliminate conflict with the various fall court terms. The meeting was well attended and, by reason of the character of the program, it was a profitable one for those in attendance.

The annual address of the president, Mr. Thomas B. Jackson, of Charleston, and an address by Mr. J. Van Dyke Norman, of Louisville, Kentucky, were the features of the session, Friday afternoon, August 19. The featured addresses of the convention program were concentrated largely on various phases of practice and civil procedure. The subject of Mr. Jackson's address was "A Proposal for Declaratory Judgment Procedure," and in view of the general trend to make civil procedure more efficient and liberal, as evidenced by the promulgation of the new federal rules, this subject, dealing with a proposed improvement in a phase of state court procedure, proved to be very timely and interesting. The address was closely followed, and the subsequent general discussion was participated in, by Professor Edson R. Sunderland, of the University of Michigan Law School, who was an honored guest at the annual meeting, and who spoke extemporaneously, but authoritatively, in analyzing and confirming Mr. Jackson's conclusion that the proposal could be carried into effect by the exercise of the rule-making power of the State Supreme Court. Mr. Norman's remarks on administrative law development, a subject of vital interest to the profession, were also highly interesting and were followed by a lively discussion.

Mr. Clarence E. Martin, of Martinsburg, a past president of the American Bar Association, acted as toastmaster at the annual banquet held Friday evening. The welcome to distinguished guests was made by Hon. Homer A. Holt, Governor of West Virginia, and Mr. Lewis C. Williams, President of The Virginia Bar Association, brought to the meeting the greeting of the members of that Association. Mr. C. T. Graydon, of Columbia, South Carolina, made an entertaining address at the banquet.

In addition to the other distinguished guests mentioned, the meeting was especially honored by the presence of Hon. Mr. Justice Davis, of the Supreme Court of Canada, who was elected to honorary membership in the Association. Mr. Justice Davis made the principal address at the banquet on the subject of pre-trial practice in Canada. This address afforded a basis for comparison with the pretrial procedure authorized by the new federal rules of civil procedure.

HON. WILLIAM G. STATHERS
President W. Va. Bar Association

The Saturday morning session was devoted to an Institute on Federal Rules, which was conducted by Professor Sunderland, of the Advisory Committee of the Supreme Court. This very important session was a practical contribution to the many members who did not attend the Cleveland Institute held by the American Bar Association in July, and the general discussion following the address was led by members of the State Association who had the benefit of the instruction from the Cleveland Institute.

Recommendations of the Executive Council, which were adopted at the meeting, were of a character designed to strengthen the Association and to make possible a more efficient administration of its finances and affairs.

The subject of bar integration, which has been discussed thoroughly for several years, seems finally to have come to the fore. A referendum on this subject is to be conducted at once among the members of the association by a special committee headed by Wright Hugus, of Wheeling, West Virginia, who has devoted much time and study to a consideration of this proposal.

William G. Stathers, of Clarksburg, West Virginia, was elected President of the Association in the annual election conducted at this meeting. Mr. Stathers has been active in the Association work for many years, and served as the extremely able and industrial Chairman of the Executive Council during the past year. Re-elected as members of the Executive Council were Ashton File, of Beckley, who was named Chairman; Rolla D. Campbell, of Huntington, and O. E. Wyckoff, of Grafton. Two new members of the Council elected were James M. Guiher, of Clarksburg, and T. P. Hardman, of Morgantown, the dean of the College of Law at West Virginia University. Thomas B. Jackson, of Charleston, as retiring President, will continue to serve as a member of the Executive Council. The district Vice-presidents elected for the year are: C. L. Spillers, of Wheeling; L. I. Rice, of Martinsburg; H. E. Dillon, Jr., of Fayetteville; Walter L. Brown, of Huntington; Harriet L. French, of Bluefield; and Robert H. C. Kay, of Charleston.

William B. Mathews, Clerk Emeritus of the Supreme Court of Appeals, was re-elected Librarian. Bernard Sclove, of Charleston, was elected by the Executive Council to fill the newly created offices of Executive Secretary and Treasurer.

BERNARD SCLOVE,
Executive Secretary.

A Call for Radio Material

MEMBERS OF THE BAR: A concise statement from you at your earliest convenience of actual outstanding instance or instances where great loss or damage has resulted from not consulting a lawyer will be greatly appreciated. We propose to use the material on radio and otherwise for the general good of everyone. Please cooperate.

ORLIN A. WEEDE, Chairman of Kansas City Bar Association Radio Committee, and Member of Public Relations Committee of American Bar Association.

1108 Federal Reserve Bank Building, Kansas City, Missouri.

Nominating Petitions

(*Continued from page* 6)

Daniel C. Knoeppel, of Grantwood.

L. Stanley Ford, Wm. J. Morrison, Jr., William R. Morrison, Francis V. D. Lloyd, John W. Griggs, of Hackensack.

David A. Pindar, of Hoboken.

Robert Carey, Herman W. Klausner, Arthur Pforr, George G. Tennant, Charles B. Collins, James D. Carpenter, Jr., Oscar Greenberg, Emanuel Weitz, Edward A. Markley, Irving Eisenberg, Alexander F. Ormsby, of Jersey City.

Arthur T. Vanderbilt, Frederick W. Hall, Martin B. O'Connor, G. Dixon Speakman, H. Edward Toner, Paul Benedict, Donnell K. Wolverton, Willard G. Woelper, Marshall Crowley, William J. Brennan, Jr., John R. Hardin, Jr., Corwin Howell, Frederick Frelinghuysen, Carl A. Feick, W. L. Morgan, Mahlon Pitney, Charles R. Hardin, Waldron M. Ward, James E. M. Tams, Burtis S. Homer, Josiah Stryker, Walter F. Waldau, Paul Mitchell, Francis W. Thomas, William L. Dill, Jr., of Newark.

Sydney V. Stoldt, Frank A. Morrison, of Ridgefield Park.

George Warren, Emma E. Dillon, of Trenton.

Texas Bar Has Office and Executive Staff at State Capitol

The Texas Bar Association is the latest of the state bars to open an office at the capitol in order to provide its membership with services of practical value.

The association offices consist of two large rooms in an office building in Austin, in which a library of current legal periodicals is being built up for the use of members. The services performed include the furnishing of information about the docket of the State Supreme Court or about the business of the state departments, the securing of copies of decisions, opinions and legislative acts, as well as the investigation and answer of inquiries regarding departmental affairs. Copies of records are made for a small charge and the office also investigates the standing of claims before the Industrial Accident Commission and the Railroad Commission, looks into articles of incorporation on file in the Secretary of State's office, reports on action taken by Blue Sky Department, and renders many other services of similar nature at the request of members.

The association is now employing the full-time services of three persons, including the executive secretary, Mr. William B. Carssow.

Courses for Practising Physicians

The Council on Medical Education and Hospitals of the American Medical Association has made a preliminary report on extension courses designed for practicing physicians in twenty-three of twenty-four states visited, which indicates a wide dissemination of post-education facilities in the medical field. Some excerpts from this report, which are of interest, follow:

"In twenty-three states, opportunities were offered physicians practicing outside of metropolitan areas to continue their professional training. Ten states have utilized a field secretary or organizer to determine the educational needs of extrametropolitan physicians and to aid materially in meeting these needs. Extension training in smaller cities or towns consisted of lectures illustrated by slides or motion pictures, demonstrations of cases, case finding clinics, symposiums with complete consideration of one subject and/or round table discussions.

"Circuits of from five to six towns were sometimes chosen as training centers where each town was visited weekly from four to ten times. This was the method employed in ten states. One physician or a team of physicians would spend from one to two months in the region of the circuit and then move on to a new area. This procedure requires permanent personnel, at least for the period of the course."

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